Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

STUART M. SELDOWITZ,

*Petitioner,*

*versus*

THE OFFICE OF THE INSPECTOR GENERAL, U. S. Department of State,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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112 pp

## QUESTIONS PRESENTED

Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit that:

(1) erroneously interprets the U.S Department of State regulation governing the Office of the Inspector General's exemption from the Privacy Act of 1974 and in doing so fails to apply a governing Office of Management and Budget regulation that has broad implications for government agencies.

(2) fails to apply the requirement that the regulation or rule setting forth a Privacy Act exemption must state the reason for the exemption.

(3) erroneously interprets the Privacy Act's statute of limitations, in cases when the government engages in deception, as running when the Plaintiff should have known of the error in his records but has no actual knowledge of the error, in accordance with the interpretation of the Court of Appeals of the Seventh Circuit, but in conflict with that of the Court of Appeals of the District of Columbia Circuit, which reads the same provision as requiring actual knowledge of the error to commence the running of the statute of limitations.

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## REPORT AND OPINIONS BELOW

On April 8, 1998, Stuart M. Seldowitz filed a complaint in the District of Columbia against the Office of the Inspector General of the U.S. Department of State (hereinafter "the OIG"). Mr. Seldowitz then filed an amended complaint on August 13, 1998.

The OIG moved to dismiss the complaint. After addressing the issue of venue, the District Court transferred the case to the Eastern District of Virginia. The OIG then filed a supplemental motion to dismiss.

The District Court held that the statute of limitations had expired on counts one and two of the complaint and dismissed those counts. The OIG filed its motion for a summary judgment as to the remaining count of the complaint. The motion was granted.

On April 19, 2000, Mr. Seldowitz filed an appeal in the U.S. Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the dismissal of counts one and two of the original complaint. The Court reversed and remanded the remaining count for discovery.

Mr. Seldowitz filed a petition for a panel rehearing on December 28, 2000. The Court denied the petition on January 9, 2001.

This petition for writ of certiorari follows.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit entered on Nov. 13, 2000. Mr. Seldowitz's petition for a panel rehearing was denied by order entered on January 9, 2001. This Court's jurisdiction to consider this petition from the final judgment or decree is invoked pursuant to Title 2, United States Code, Section 1254(1).

## RELEVANT STATUTORY AND REGULATORY PROVISIONS

See Appendix

## STATEMENT OF THE CASE

This appeal arose out of a civil case in connection with a False Claims Act investigation. Pertinent judicial proceedings were held in both federal district and appellant courts.

On April 8, 1998, Stuart M. Seldowitz filed a complaint in the District of Columbia against the Office of the Inspector General of the U.S. Department of State (hereinafter "OIG"). This two-count complaint alleged violations of the Privacy Act, 5 U.S.C. § 552a, charging that the OIG used false, inaccurate, and incomplete records to threaten a civil prosecution of Mr. Seldowitz under the False Claims Act and sought compensatory damages. On August 13, 1998, Mr. Seldowitz filed an amended complaint, adding a third count, also under the Privacy Act. This count demands that the OIG correct its records.

The OIG moved to dismiss Mr. Seldowitz' complaint on multiple grounds, including improper venue. Mr. Seldowitz timely opposed this motion. The District Court declined to decide any question other than that for venue. It denied the OIG's request for dismissal on this ground, but ordered that the case be transferred to the Eastern District of Virginia.

After the transfer, the OIG filed a Notice of Hearing on its motion to dismiss. U.S. District Judge Gerald B. Lee granted the motion to dismiss without prejudice, erroneously based on the ground that Mr. Seldowitz had failed to file an opposition. This order was ultimately vacated.

The OIG then filed a supplemental motion to dismiss. The District Court held that the statute of limitations expired

as to counts one and two before the initial complaint had been filed, and dismissed those counts.

Discovery was thereafter stayed by order of the Magistrate Judge upon motion of the OIG.

The OIG filed its motion for summary judgment as to count three. The motion was granted in favor of the government.

On Nov. 13, 2000 the United States Court of Appeals for the Fourth Circuit affirmed in part, reversed in part and remanded.

On December 28, 2001, Mr. Seldowitz filed a petition for a panel rehearing. The Court of Appeals denied the petition by order dated and entered January 9, 2001.

This appeal follows.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT'S OPINION ERRONEOUSLY INTERPRETS THE STATE DEPARTMENT'S REGULATION GOVERNING THE INSPECTOR GENERAL'S EXEMPTION TO THE PRIVACY ACT AND FAILS TO APPLY AN OFFICE OF MANAGEMENT AND BUDGET REGLATION GOVERNING THIS EXEMPTION

It is respectfully contended that the United State Court of Appeals has misinterpreted the exemption provisions of the Privacy Act of 1974 (5 U.S.C. Sec. 552a).

In deciding this case, the Court of Appeals was required to interpret a regulation of the U.S. Department of State (hereinafter "DOS" or "the State Department") issued pursuant to the Privacy Act of 1974 (hereinafter "the Act"). The regulation concerns the Act's requirements whereby an

individual may have access to certain agency records pertaining to that person and has the right to require corrections to an inaccuracy or incompleteness in those records.

The regulation is found at 22 C.F.R. § 171.32, and it has numerous sections. Generally, it can be viewed as providing exemptions to the access and correction provisions of the Act for records compiled and maintained by agencies within the Department of State, including the Office of the Inspector General. The regulation also contains exceptions to this exemption.

It is the interpretation of these exemptions and their exceptions that is at issue in this case.

*A. Section 171.32(h) Limits the Inspector General's Exemption to Before Completion of the Investigative and Judicial Process*

Two subparts of 22 C.F.R. §171.32 are of significant import here. The first is Section171.32(h). In describing the records that are authorized to be exempt from the Privacy Act, it reads as follows:

> Records originated by another agency when that agency has determined that the record is exempt under [the Act]. Also, pursuant to Section (j)(2) of the Act, records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Branch of the Office of Security and by the [I]nspector General may be exempted from the requirements of any part of the Act except subsections [not applicable to this case] to the extent necessary to assure effective

> completion of the investigative and judicial processes.

The first error contained in the Court of Appeal's written opinion is found on page seven of that opinion. There, the Court said:

> Section 171.32(h) applies only to "[r]ecords originated by another agency when that agency has determined that the record is exempt" under [the Act]. Accordingly, the language of §171.32(h) making reference to the completion of the investigative and judicial process is inapplicable.

To the contrary, Section 171.32(h) contains two parts, comprised by the two sentences of that Section. These two sentences define two distinct categories of records, and address their exemption status separately. Only the second category applies to records originating within the OIG.

The first sentence reads: "Records originated by another agency when that agency has determined that the record is exempt under [the Act]." This is the first category of Section 171.32(h) records. Given the language of this sentence, it is clear that records held by one agency that originate within a second agency have a blanket authorization for exemption when the second agency has made the required determination. Since the records at issue here were compiled by the OIG, they do not fall into this category, and this part of the regulation does not apply.

The second sentence begins with the word, "Also." This word indicates that another category of records, *other than those* "originated by another agency . . . ," is authorized as exempt under this Section. The express language of the remainder of the second sentence confirms that this is the

correct interpretation of the Section. In pertinent part, it reads: "Also . . . records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Branch of the Office of Security and by the [I]nspector General may be exempted to the extent necessary to assure effective completion of the investigative and judicial processes."

Through count three, Mr. Seldowitz seeks to amend three categories of records: 1) those compiled by the OIG, including the report provided to the U.S. Attorney's Office recommending that Mr. Seldowitz be prosecuted under the False Claims Act; 2) those compiled by the OIG Office of Audits concerning its Geneva audit and investigation, in which are documents compiled for administrative/fiscal purposes; and 3) those compiled by an OIG internal review responding to allegations of misconduct and unethical conduct on OIG's part during its Geneva audits and investigations.

All of the records at issue in this case were "compiled by the [I]nspector General." For this reason, they fall within the second category of Section 171.32(h) records. This being the case, the remainder of the second sentence applies to them: "[They] may be exempted to the extent necessary to assure effective completion of the investigatory and judicial processes."

Using the above analysis, it becomes clear that the OIG records at issue can be exempted only the extent necessary to insure the completion of an investigation or judicial proceeding.

### *B. The Federal Register Notice Supports this Limitation of the Inspector General's Exemption to the Completion of the Investigative and Judicial Process*

The above analysis need not be taken in isolation. The Notice published by the DOS during the promulgation of this regulation provides ample support for this interpretation.

Public Notice 1298 of the Department of State, 56 Fed. Reg. 7071 (Feb. 21, 1991), proposed the language which eventually amended 22 C.F.R. § 171.32(h) so that it now includes the OIG's records as part of that Section's second category. These records are referred to as the "Records of the Inspector General and Automated Individual Cross-Reference System, STATE-53."

The last page of this Notice reads as follows:

> Systems exempted from certain provisions of the act:
>
> Certain records contained within this system of records may be exempted from the requirements of any part of the Act [except requirements not applicable to this case] *to the extent necessary to protect properly classified information and to assure effective completion of the investigative and judicial processes.* See 22 C.F.R. § 171.32. (Emphasis added.)

From this language, and the Notice taken in total, it is clear that the provision permitting an exemption for the Inspector General's documents was promulgated independently from those regarding records originating from other agencies. It is also clear that the second sentence of Section 171.32 creates a distinct and separate category of authorized exemptions, which, as finally issued, limits such

exemptions "to assure the effective completion of the investigative and judicial process."

### *C. The Opinion Erroneously Reads Section 171.32(i) in Isolation, Thereby Reaching an Incorrect Interpretation*

The Court of Appeals' opinion relied upon Section 171.32(i) in holding that the OIG records were exempt from the pertinent disclosure and amendment provisions of Privacy Act. Specifically, the Court said the following:

> The proper section in this case is 22 C.F.R. § 171.32(i), which provides that "[r]ecords of the Inspector General" . . . "are exempted under [the Act] to the extent authorized and determined by the agency." (Opinion at 7.)

The Court of Appeals erred by effectively reading this provision as "to the extent authorized [by the agency] and determined by the agency." As will be demonstrated, the correct reading is "to the extent authorized [by statute] and determined by the agency." Once this interpretation is understood, the reasons why the records at issue are not exempt become clear.

Before beginning this analysis, it is valuable to recognize two important principals of statutory construction: (1) force should be given to every word or clause of a legislative enactment. *United States v. Mensche*, 348 U.S. 528 (1955); *U.S. Army Engineering Center v. Federal Labor Relations Authority*, 762 F.2d 4099 (4th Cir. 1985); and (2) each part of a statute must be construed with every other part so to produce a "harmonious whole." *In re Public National*

*Bank of New York*, 278 U.S. 555 (1928); *see also Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050 (1993).

In order to give force to the second sentence of Section 171.32(h), the interpretation of Section 171.32(i) must be modified from that put forth by the Court on page seven of its opinion in the manner proposed by Mr. Seldowitz. If such a modification is not made, the second sentence of Section 171.32(h) has no meaning.

Mr. Seldowitz' analysis of Section 171.32(i) begins by focusing on the word "authorized." This word first appears in the regulation in the introductory paragraph of the regulation, which states: "The following exemptions are authorized under authorized under 5 U.S.C. § 552a(j) and (k): . . ."

As can be seen, a colon appears after the citation to the Privacy Act. Following that colon is a list of nine categories (with subcategories) of documents identified as "authorized" to be exempt. They are labeled Sections 171.32(a) through (h). It should be noted at this point that Sections 171.32(a) through (g) end with semicolons, while Section 171.32(h) ends with a period. Mr. Seldowitz' analysis is that Sections (a) through (h) describe documents which are authorized to be exempted, but are not yet exempted. This analysis is based upon the plain language of the regulation.

In contrast, the remaining three sections of the regulation, Sections 171.32(i) through (k), each end with a period. A careful reading of Sections (j) and (k) show that each expressly, and independently, exempts records: each reads, "Portions of the following systems of records *are exempted from* [specified provisions of the Privacy Act]." (Emphasis added.) Nowhere in Sections (a) through (h) can be found the words "are exempted."

Section 171.32(i) is different.[1] Like Sections (j) and (k), it expresses a means for the exemption of records.

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[1] The full, pertinent text of Section 171.32(i) is:

However, unlike Sections (j) and (k), its exemption-provision is limited. By its express language, it merely specifies whether, or how, "portions" of a category of records *already authorized in subsections (a) through (h)*, can be made exempt by agency action. It does not take such action itself; therefore, it does not exempt any records within or outside the categories described.

### *D. The Controlling Regulation Issued by the Office of Management and Budget Supports Mr. Seldowitz' Reading of Section 171.32(i)*

Mr. Seldowitz' interpretation receives conclusive support when the language of 22 C.F.R. Section 171.32 is read in the context of the rulemaking which occurred shortly after the Privacy Act was enacted.

The original version of the 22 C.F.R. § 171.32 was first proposed in 1975, at 40 Fed. Reg. 40456 (September 2, 1975) and was promulgated as 22 C.F.R. §6a.6.

OMB was given authority under the Privacy Act to issue guidelines and regulations controlling other federal agencies' rulemaking in the implementation of the Act. 5 U.S.C. §552a(v). "As a general rule, the OMB Guidelines are entitled to the deference usually accorded the interpretation of the agency that has been charged with the administration of a statute." FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW at 620 (U.S. Dept. of Justice ed. Sept. 1998); *see Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992); *Baker v. Department of the Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987); *Perry v. FBI*, 759 F.2d

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Portions of the following systems of records are exempted from 5 U.S.C. 552a(j) to the extent authorized and determined by the agency originating the records. The names of the systems correspond to those published in the FEDERAL REGISTER by the Department.

1271, 1276 n.7 (7th Cir. 1985); *Smiertka v. United States Dep't of the Treasury*, 604 F.2d 698, 703 n.12 (D.C. Cir. 1979).

The promulgation of 22 C.F.R. §6a.6 followed by three months the issuance of OMB Circular A-108, 40 Fed. Reg. 28948 (July 9, 1975). This Circular applies generally to "Federal agencies" that collect "personal information about individuals." 40 Fed. Reg. 28948. It applies to all agencies subject to the Privacy Act. *Id.* The broad implications and scope of the Circular are clearly stated: "Each agency head shall establish and maintain procedures, consistent with the Act, *OMB guidelines*, and related directives issued pursuant to this Circular . . . ." *Id.* (emphasis added.)

By misinterpreting 22 C.F.R. § 171.32(h), the Court of Appeals bypasses the requirements of the OMB Circular, which applies to these records and to records collected and maintained by numerous federal agencies under the Privacy Act. By failing to consider the requirements of the Circular, the Court of Appeals renders the regulations moot.

As provided by that Circular:

> In applying any of [the (j) and (k) exemption provisions at issue in this case], it is important to recognize the following:
>
> > No system of records is automatically exempt from any provision of this Act. To obtain an exemption for a system from any requirement of the Act, *the head of the agency that maintains the system must make a determination that the system falls within one of the categories of system which are*

> *permitted to be exempted, and publish the determination as a rule* in accordance with the requirements . . . of the Administrative Procedure Act. That notice must include the specific provisions from which the system is proposed to be exempted and why the agency considers the exemption necessary. 40 Fed. Reg. 28971 (July 9, 1975) (emphasis added).

The Circular continues as follows:

> *[A]n agency head is authorized, but not required, to exempt a system* from all or any portion of selected provisions of the Act . . . . In commenting on this provision, the House Committee noted:
>
> > [W]e urge [the C.I.A. and criminal justice agencies] to keep open whatever files are presently open and to make available in the future whatever files can be made available without clearly infringing on the ability of the agencies to fulfill their missions. (HOUSE REPORT 93-1416, p. 19.) *Id.*

Taking OMB's requirements into account, and reading the 1975 rulemaking of the Department of State in the context of the 1975 OMB Circular, the following becomes clear: Sections 171.32(a) through (h) merely set forth those

categories of records maintained by agencies within the State Department which the DOS has found *are authorized by the Act* to be exempted *if* appropriate action is taken by the heads of those agencies maintaining the records. The next step, so-far left undone by the OIG, is for the head of the OIG to make a determination that some of those records within its control should be exempted, and for the OIG to implement this determination with further rulemaking.[2]

The fact that no such rulemaking has ever been forthcoming by the OIG is sufficient to overturn the Court of Appeals' opinion on this point. However, this is not the only basis for such a decision. As argued by Mr. Seldowitz in the court, the authorization to exempt portions of the pertinent records by the OIG is expressly limited to that specified in Section 171.32(h), that is, "to the extent necessary to assure effective completion of the investigative and judicial processes."

Since the investigation of Mr. Seldowitz ended in 1995, and no judicial proceeding based on that investigation ever commenced, the Privacy Act exemption relied upon by the OIG for refusing to correct Mr. Seldowitz' records is not applicable.

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[2] In this regard, it is pertinent to note that Section 171.32(h) and 56 Fed. Reg. 7071 speak in terms of the permissive, *e.g.*, they say that records "may" be exempted. They do not say that records "are" exempted by action of the regulation. Further action is clearly contemplated for any claimed exemption to be made effective.

## II.

## THE COURT'S OPINION FAILS TO APPLY THE REQUIREMENT THAT THE REGULATION OR OTHER RULE SETTING FORTH A PRIVACY ACT EXEMPTION MUST STATE THE REASON FOR THE EXEMPTION

For an exemption to apply, "[T]he promulgated rules must state 'why the system of records is to be exempted.'" Opinion, p. 6, *citing* 5 U.S.C. § 552a(j), (f); and *Ryan v. Department of Justice*, 595 F.2d 954, 957 (4th Cir. 1979).

As already discussed, an agency cannot simply, and in an *ad hoc* fashion, claim exemptions from the Privacy Act. Instead, it must claim exemptions only as to specific categories of records authorized by the Act; it must do so by a rule or regulation; and, in such rule or regulation, expressly set forth the rationale for claiming any exemptions. This last requirement has been previously explained by the Fourth Circuit in *Ryan*, 595 F.2d at 957, and hereafter will be referred to as "the *Ryan* requirement."

### *A. The Court's Initial Opinion Fails to Identify How the OIG's Claim of an Exemption Satisfies the* Ryan *Requirement*

In granting summary judgment against Mr. Seldowitz, the District Court held that the rationale for the exemption it found in Section 171.32(i) was the following language in Section 171.32(h): "to the extent necessary to assure the effective completion of the investigatory and judicial process."

The Court of Appeals rejected the District Court's interpretation. In the initial Opinion, the Court of Appeals said that Section 171.32(h) applies only to "[r]ecords originated by another agency when that agency has determined that the record is exempt" under 5 U.S.C. § 552a. If this analysis is correct, then Section 171.32(h)'s reference to the proper completion of the investigative and judicial process is inapplicable to the OIG's internal records,

including the OIG's investigative records which Mr. Seldowitz seeks to amend.

There is no other provision in the regulation, or the rulemaking which promulgated the regulation, which satisfies the *Ryan* requirement; and nowhere in the Opinion does the Court of Appeals point to or provide any explanation as to how Section 171.32(i) complies with the *Ryan* requirement.

For these reasons, the Opinion must be judged internally incomplete; and, because the Opinion fails to properly analyze Section 171.32(i), it never addresses whether the second sentence of Section 171.32(h) is a rationale (as proposed by the district court), or is, instead, language of limitation (as explained by Mr. Seldowitz). For this reason, Mr. Seldowitz requests that this Court grant certiorari to address this matter.

### *B. No Rational Has Been Published by the OIG Which Satisfies the* Ryan *Requirement*

Mr. Seldowitz also rejects the Court of Appeals' interpretation of the language found in Section 171.32(h) as being a rationale for an exemption. For the reasons discussed in detail in Point I, above, the second sentence of Section 171.32(h) is clearly and simply a limitation placed by DOS on records authorized to be exempted under the Act.

In this Petition for Writ of Certiorari, Mr. Seldowitz has examined in detail the history of the exemption found at 22 C.F.R. § 171.32(i), including the rulemaking which led to this exemption. That history will not be repeated in its entirety here. Suffice it to say that nowhere has the OIG published an explanation for the exemption it claims is found at 22 C.F.R. § 171.32(i).

## III.

## WHETHER THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE STANDARD THAT WHEN THE GOVERNMENT ENGAGES IN DECEPTION, THE PRIVACY ACT'S STATUTE OF LIMITATIONS BEGINS TO RUN ONLY WHEN THE PLAINTIFF HAS ACTUAL, NOT CONSTRUCTIVE OR SUGGESTIVE, KNOWLEDGE OF THE VIOLATION

The Privacy Act has a two-year statute of limitations. 5 U.S.C. § 552a(g)(5). Under normal circumstances, this time period is not held to begin running until the "plaintiff knows or should have known of the alleged violation." *Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987).

However, the Privacy Act also has a provision that delays the start of the running of the statute of limitations (hereinafter "the delaying provision"), which reads as follows:

> An action to enforce any liability under this section may be brought . . . within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. 5 U.S.C. § 552a(g)(5).

There is a split between the Circuits as to what standard applies to commence the running of the statutes of limitations under this provision. The United States Court of Appeals for the District of Columbia Circuit has interpreted this provision as requiring that a plaintiff must have "actual knowledge" of the misrepresentation before the statute of limitations begins to run. Specifically, that court has explained the tolling provision as follows:

> [The delaying provision] extends the normal limitations period in order to insure that the government cannot escape liability by purposely misrepresenting information that could establish it has already violated the Act. [Citation omitted.] *In such cases, the Act allows the period to commence upon actual discovery of the misrepresentation,* whereas our holding today is that for other actions under the Act, the period begins when the plaintiff knew or should have known of the violation. Our holding thus in no way affects the special treatment Congress pro.ided for the particularly egregious cases of government misconduct singled out in the Act's statute of limitations.

*Tijerina*, 821 F.2d at 798.

The District of Columbia Court of Appeal's interpretation is in conflict with that of the Court of Appeals for the Seventh Circuit. That court has held that the standard for the commencing the statute of limitations under the same provision is "when the plaintiff first knew or had reason to know of an error in maintaining his records." *Dilberti v. United States of America*, 817 F.2d 1259, 1262 n.1 (7th Cir. 1987).

Mr. Seldowitz' complaint alleges that the OIG misrepresented information. Specifically, the complaint alleges that the OIG (1) willfully compiled an inaccurate and incomplete record of his voucher for use in an OIG investigation, and threatened civil prosecution based upon that record; and (2) willfully misrepresented that record to Mr. Seldowitz, that is, provided false information to Mr. Seldowitz during settlement discussions, thereby covering-up these facts. The complaint also alleges that Mr. Seldowitz did not obtain actual knowledge of these misrepresentations until on or after April 17, 1996. (Appendix.)

The instant lawsuit was commenced on April 9, 1998, within the two-year statute of limitations. The Court of Appeals agreement with the District Court that the suit was filed outside of the statute of limitations is, for this reason, in error. Opinion, p. 6 – 8.

The word "actual" means "something actually received or at hand . . . as distinct from estimated or expected . . .." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 22 (ed. 1966).

Presented to the Court of Appeals were affidavits of Stuart Seldowitz, (Appendix), and attorney Ralph D. Martin, (Appendix), who represented Mr. Seldowitz during the FCA negotiations with the government. Taken together, these affidavits provide a factual basis that Mr. Seldowitz did not have actual knowledge of the OIG's compilation of a false voucher record, and the misrepresentation of that record, until after he compared the voucher documents maintained by the National Finance Center with those provided to the U.S. Attorney's Office by the OIG. They further establish that Mr. Seldowitz did not make the necessary comparison until after Mr. Martin transmitted the OIG records to Mr. Seldowitz on or after April 17, 1996.

Put simply, Mr. Seldowitz was fooled by the OIG, a law enforcement agency in which he was entitled to place his trust and did not discover what the OIG had done until April 17, 1996.

The Court of Appeals committed two errors in its Opinion. The first was to cite *Tijerina's* holding that the statute of limitations generally begins to run when a plaintiff "should have known" of the violation, while bypassing its articulation of a more lenient standard when government misrepresentation is involved. Opinion, p. 7 – 8.

The Court of Appeal's second error was to rely upon *Bowyer v. U.S. Dept. of Air Force*, 875 F.2d 632 (7th Cir. 1989), *cert. den.*, 493 U.S. 1046 (1990), without closely examining the differences in the facts of that case from those at bar, in holding that it was not necessary for Mr. Seldowitz to be able to make a physical comparison of (1) the sets of receipts shown to him by the OIG during a meeting at the U.S. Attorney's Office with (2) that set of receipts submitted by Mr. Seldowitz, processed by the Department of State and stored at the National Finance Center, for Mr. Seldowitz to have knowledge of the government's error. Opinion, p. 8.

In *Bowyer*, the plaintiff had access to the records at a relevant time; discussed their existence with his lawyer; made a false statement to the trial court that he lacked knowledge of the records' existence; and relied, for the "misrepresentation" upon a fairly innocuous statement that a supervisor did not keep files on temporary employees. *Id.* at 636-37. In summary, Bowyer failed to make a sufficient showing that the misrepresentations in his case caused material delay towards actual discovery of the existence of the inaccurate records. In contrast, Mr. Seldowitz was shown false documents by an AUSA under threat of a civil prosecution of himself and his wife. Furthermore, he had no knowledge that a law enforcement agency had compiled records from sources other than the accurate source of those records and, having instead constructed an incomplete and inaccurate voucher, that the OIG had incorrectly attributed that false voucher to him. Given the same facts, the *Bowyer* court would very likely subscribe to the actual knowledge doctrine espoused by the District of Columbia Circuit. *See Bowyer*, 875 F. 2d at 637 n. 4.

The Opinion offers no explanation as to how Mr. Seldowitz can be held to have had actual knowledge of the government's misrepresentation when the United States government had expressly told Mr. Seldowitz his recollection was completely in error and a federal attorney and agents had concurrently put before Mr. Seldowitz as unquestionable evidence of his false memory what was, in fact, a false receipt or an altered receipt materially different from that which Mr. Seldowitz had submitted to the State Department. Mr. Seldowitz' position, as set forth in his affidavit, was that he accepted the government's representation as correct and therefore had no knowledge of the government's misrepresentation until he could compare the two sets of receipts. Without contradictory evidence, of which none was offered, Mr. Seldowitz' position was to be taken as true for purposes of the motion for summary judgment. The Court of Appeals therefore cannot properly have held that Mr. Seldowitz had actual knowledge of the government's misrepresentation at the time it attributed that knowledge to him. By disregarding Mr. Seldowitz affirmed reliance on the principle that the government was telling him the truth, in deciding this issue as a matter of summary judgment the Court of Appeals, in fact, applied the "should have known" standard adopted by the Seventh Circuit in *Dilberti*. The Court is therefore in direct conflict with the District of Columbia Circuit as to the standard to be applied in cases under the Privacy Act where there is an alleged misrepresentation by the government.

To hold that "discovery" of the government's misrepresentation occurs when an individual did not yet discover the misrepresentation, but rather only should have known of the misrepresentation goes against Congress' intent and the clear language of the Act. Such a premature commencement of the running of the statute of limitations would have the broad policy effect of denying many individuals the right expressly granted to them by Congress to employ the Privacy Act to seek justice by amending an

erroneous or incomplete record regarding that individual. For these reasons, petitioner respectfully requests that this Court review and corect the standard applied by the Courts of Appeals of the Fourth and Seventh Circuits and instead affirm that standard set forth by the District of Columbia Circuit.

## CONCLUSION

For all the reasons stated, Petitioner, Stuart M. Seldowitz asks that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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Counsel for Appellant,
Stuart M. Seldowitz

No. 00-1142

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

September 25, 2000, Argued

November 13, 2000, Decided

STUART M. SELDOWITZ,
Plaintiff-Appellant,

v.

THE OFFICE OF THE INSPECTOR GENERAL, U. S. Department of State, Defendant-Appellee.

COUNSEL:
ARGUED: Andrew Grosso, Washington, D.C., for Appellant.

Jeri Kaylene Somers, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

ON BRIEF: William M. Palmer, Washington, D.C., for Appellant.

Helen F. Fahey, United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES:

Before MICHAEL, MOTZ, and TRAXLER, Circuit Judges.

OPINION:

PER CURIAM:

Stuart M. Seldowitz appeals the district court's order dismissing as barred by the statute of limitations Counts One and Two of his Privacy Act claim, and the district court's order granting summary judgment to the government on Count Three. We affirm in part, reverse in part, and remand.

I.

The facts, viewed in the light most favorable to Seldowitz, are as follows. Seldowitz, a career foreign service officer, was assigned in 1989 to the Office of Strategic Nuclear Policy. In this capacity, Seldowitz served on the United States delegation to the Nuclear Space Talks in Geneva, Switzerland. Seldowitz's wife, Rosalinda, also traveled to Geneva, serving as the secretary to a deputy negotiator. Seldowitz received per diem paid by the Bureau of Political/Military Affairs, and his wife received per diem paid by the Arms Control Agency.

The Seldowitzes rented a private apartment in Geneva, and each obtained a separate receipt from the landlady. Because the receipts reflected the entire amount of rent, Seldowitz crossed out the number of Swiss Francs paid and wrote in half the amount. After submitting the receipts, Seldowitz was told by an administrator in the Bureau of Political/Military Affairs not to annotate the receipts because the per diem amount was not contingent on how much Seldowitz paid for lodging. After this conversation, Seldowitz did not annotate future receipts. However, Seldowitz does not dispute that the entire amount of the rental appeared on the travel voucher which he signed.n1

In 1990, the Office of Audits of the State Department's Inspector General reviewed the travel vouchers of the Geneva delegation. Based on this audit, the Office of the Inspector General (OIG) investigated Seldowitz for submitting a false claim against the United States as a result of amounts claimed on his travel voucher. The findings of the investigation were turned over to the United States Attorney's Office for the Eastern District of Virginia. In 1995, the United States Attorney informed Seldowitz that he was contemplating a civil prosecution under the False Claims Act, see 31 U.S.C.A. § § 3729-33 (West 1983 & Supp. 2000), based on a report prepared by the OIG.

Seldowitz then met with officials from the State Department, the OIG, and the United States Attorney's Office to discuss the possible civil prosecution. During the meeting Seldowitz mentioned that he had annotated the first housing receipts to show only half of the housing expenses, and an AUSA then showed him allegedly the same receipts from the OIG's files which did not reflect any annotation. Shortly thereafter, Seldowitz entered into a settlement agreement with the government in which he agreed to pay restitution of $ 15,000.

Seldowitz later requested copies of his travel vouchers from the National Finance Center and he received the copies in October 1995. Included in the packet from the National Finance Center were annotated receipts showing half the amount of rent. Seldowitz also requested in the fall of 1995 that his attorney obtain copies of the OIG voucher documents, including the receipts showing no annotations. Seldowitz received these materials on April 17, 1996, and for the first time made a side-by-side comparison of the annotated and unannotated receipts.

In March 1998, Seldowitz requested pursuant to the Privacy Act, see 5 U.S.C.A. § 552a (West 1996 & Supp. 2000), that the State Department's records "be amended in

order to accurately reflect that Mr. Seldowitz properly followed all Department procedures when submitting his voucher requests." J.A. 218. The Office of Information Resources Management responded that it would be improper to consider amending records because the Integrity Committee of the President's Council on Integrity and Efficiency was investigating a complaint filed by Seldowitz regarding the OIG investigation. Seldowitz appealed this decision, and an appeals officer affirmed that the proper course was to suspend action pending completion of the Integrity Committee's investigation.

On April 9, 1998, Seldowitz filed a complaint in the United States District Court for the District of Columbia, and amended the complaint on August 13, 1998. The case was transferred to the United States District Court for the Eastern District of Virginia on June 30, 1999. Count One alleged that the State Department failed to maintain accurate records in violation of 5 U.S.C.A. § 552a(g)(1)(C), (4). Count Two alleged that the State Department wrongfully threatened a False Claims Act prosecution and coerced a settlement in violation of 5 U.S.C.A. § 552a(g)(1)(D), (4). Count Three alleged improper refusal to amend records in violation of 5 U.S.C.A. § 552a(g)(1)(A). The district court dismissed Counts One and Two on statute of limitations grounds, and later granted summary judgment in favor of the government on Count Three. Seldowitz appeals.

II.

Seldowitz challenges the district court's dismissal of Counts One and Two of the complaint as time barred. Under Counts One and Two Seldowitz alleged that the government violated provisions of the Privacy Act, which require agencies to keep accurate records "necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record." 5

U.S.C.A. § 552a(g)(1)(C). Suit must be brought "within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual." 5 U.S.C.A. § 552a(g)(5). Seldowitz acknowledges that on June 15, 1995, an AUSA showed him two unannotated receipts relating to the May 1990 voucher, and that he received copies of his annotated vouchers from the National Finance Center on October 5, 1995. However, Seldowitz did not file his original complaint until April 9, 1998--more than two and one half years after he had been shown the unannotated receipts during the meeting with the AUSA

Seldowitz argues that the misrepresentation exception applies because he did not obtain a copy of the unannotated receipts shown to him by the AUSA until April 17, 1996, when his attorney forwarded copies to him. In support of his position, Seldowitz points the court to Tijerina v. Walters, 261 U.S. App. D.C. 301, 821 F.2d 789 (D.C. Cir. 1987). In Tijerina, the Veteran's Administration Office of the Inspector General on July 19, 1982, disclosed to the Texas Board of Bar Examiners that Tijerina had falsified a loan application but that he had not been prosecuted because the government had not sustained a loss. See 821 F.2d at 792. Tijerina did not discover the OIG disclosure until October 1983, and he disputed the OIG's reason for failing to prosecute him. Tijerina filed suit against the OIG under the Privacy Act on July 30, 1984, but the district court dismissed the claim because the statute of limitations, according to the district court, began to run on July 19, 1982--the date of the communication to the bar examiners. The District of Columbia Circuit reversed, holding that the statute of limitations did not begin to run until Tijerina knew or should have known of the OIG's July 1982 letter, which was October 1983. See id. at 798.

We believe that Tijerina supports the district court's statute of limitations analysis. In the present case, Seldowitz was aware of the alleged inaccuracies when the AUSA showed him the unannotated receipts on June 15, 1995. At that point, consistent with Tijerina, the statute of limitations began to run. Seldowitz had actual knowledge of the alleged error, and the fact that he did not make a physical comparison of the two sets of receipts until April 17, 1996, makes no difference. See Bowyer v. United States Dep't of Air Force, 875 F.2d 632, 637 n.4 (7th Cir. 1989) (rejecting the argument that a plaintiff must have actual possession of all relevant documents before the limitations period begins to run). Accordingly, the district court correctly concluded that Counts One and Two are barred by the statute of limitations.

III.

Under the Privacy Act, an individual alleging inaccuracies in agency records may "request amendment of a record pertaining to him." 5 U.S.C.A. § 552a(d)(2). However, the statute contains general and specific exemptions. The general exemption provision provides that "an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws" may adopt rules exempting records from the § 552a(d) access and amendment provisions. 5 U.S.C.A. § 552a(j)(2). The specific exemption provision provides that an agency may issue rules exempting "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)." 5 U.S.C.A. § 552a(k)(2). Under both the general and specific exemptions, the promulgated rules must state "why the system of records is to be exempted." 5 U.S.C.A. § 552a(j), (k); see also Ryan v. Department of Justice, 595 F.2d 954, 957 (4th Cir. 1979) (explaining what procedures an agency must take to exempt records under the Privacy Act).

The first set of records Seldowitz seeks changes to under Count Three of the complaint are the OIG records compiled while OIG was investigating Seldowitz for a possible False Claims Act violation. The OIG believed that Seldowitz and his wife "submitted duplicate and altered receipts for lodging expenses and thus acted with reckless disregard for the truth or falsity of the information they were providing to the United States." J.A. 121. Although an AUSA later made a decision to pursue a civil prosecution, it appears clear that the OIG investigators contemplated a possible criminal prosecution. Seldowitz does not dispute that the OIG's principal function is law enforcement or that the OIG's records in question were related to the False Claims Act investigation. Pointing to 22 C.F.R. § 171.32(h) (2000), Seldowitz argues that records of investigations are no longer exempted after "completion of the investigative and judicial processes." n2 And because his case has long been closed, Seldowitz believes that the records in question are no longer shielded from the Privacy Act. We disagree.

Section 171.32(h) applies only to "records originated by another agency when that agency has determined that the record is exempt" under 5 U.S.C. § 552a. Accordingly, the language of § 171.32(h) making reference to the completion of the investigative and judicial process is inapplicable. The proper section in this case is 22 C.F.R. § 171.32(i), which provides that "records of the Inspector General" "are exempted under 5 U.S.C. § 552a(j) to the extent authorized and determined by the agency." The OIG records fall squarely within the general exemption which permits exclusion of records "pertaining to the enforcement of criminal laws," 5 U.S.C.A. § 552a(j)(2), and the OIG has properly exempted the investigatory records. Consequently, the district court did not err in granting summary judgment to the OIG as to its records of the False Claims Act investigation.

The second set of records Seldowitz seeks amendments to are the records compiled by the OIG Office of Audits. These records were compiled in Geneva, and, as a result of the audit, thirty-two cases of suspected travel voucher fraud were referred to OIG investigators for further review. Seldowitz describes these records as compiled for administrative and fiscal purposes, and argues that they are not covered by either the general or specific exemptions of 5 U.S.C.A. § 552a. Again, we disagree.

Even if we assume that Seldowitz is correct that the principal function of the audit department does not "pertain[ ] to the enforcement of criminal laws," and therefore the general exemption does not apply, Seldowitz cannot escape § 552a(k)(2) which permits exemption of "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)." 5 U.S.C.A. § 552a(k)(2); see also Strang v. United States Arms Control & Disarmament Agency, 275 U.S. App. D.C. 37, 864 F.2d 859, 862 (D.C. Cir. 1989) (giving broad construction to term "law enforcement" as used in § 552a(k)(2)). Without question, the audit records were compiled with an eye towards possible prosecutions of travel voucher fraud, and OIG officers eventually opened ten investigations. As required, 22 C.F.R. § 171.32(b) makes specific mention of "invesitgatory material compiled for law enforcement purposes[ ] other than material within the scope of 5 U.S.C. 552a(j)(2)," and we can discern no limitation in the regulations on this exemption. Hence, the district court did not err in granting summary judgment as to the audit records.

The final set of records Seldowitz seeks changes to are the OIG internal review records responding to allegations of OIG misconduct regarding its investigation of the Geneva delegation's travel vouchers. The internal review was not undertaken "to assess the guilt or innocence" of the employees who had complained about the OIG's handling of the voucher investigation, J.A. 133, but rather was

commenced to determine whether the OIG's investigators should adopt additional procedures to ensure impartiality. The result of the internal review was a number of recommendations ranging from continuing education for investigators to delinking career advancement with prosecutorial results.

Unlike the other two sets of records considered, the internal review records have no connection to law enforcement purposes. The internal review was simply meant to streamline procedures and to reform investigative techniques which had led to much hostility between OIG officials and members of the arms control delegation. Accordingly, neither the general or specific exemption is applicable.

The exemptions aside, the government argues that the internal review records are not retrievable by name, and therefore are not covered by the Privacy Act. See 5 U.S.C.A. § 552a(a)(4), (5) (specifying that records covered by the Privacy Act must be retrievable by some "identifying particular assigned to the individual"). In support of this contention, the government offers two affidavits from OIG officials. At appellate argument, the government suggested that these affidavits were presumptively correct and that Seldowitz was not entitled to discovery. In fact, the government instructed its witnesses not to appear for depositions which would have addressed this issue. We cannot agree with the government that Seldowitz was not entitled to discovery on this matter and that summary judgment was properly decided based upon the affidavits.

Federal Rule of Civil Procedure 26(b)(1), in pertinent part, provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." See also Ralston Purina Co. v. McFarland, 550 F.2d 967, 973 (4th Cir. 1977) (noting that "the broad scope of discovery is evident in Rule

26(b)(1)"). Discovery concerning the records in question will likely resolve whether the records are retrievable within the meaning of the Privacy Act. Seldowitz should not be forced in a situation like this to accept from a government official an affidavit stating that the records have no identifying particular assigned to Seldowitz. n3 Hence, the district court erred in granting summary judgment as to the internal review records. n4

IV.

For the foregoing reasons, we affirm the district court's dismissal of Counts One and Two. We also affirm the grant of summary judgment as to the audit records and the records of the investigation. However, we reverse the grant of summary judgment on the internal records and remand for discovery.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

----------Footnotes----------

n1 Based on the record before us, it is unclear whether Seldowitz was on a strict per diem or whether the amount he received was contingent on his expenses.

n2 Section 171.32(h) exempts the following:

Records originated by another agency when that agency has determined that the record is exempt under [ 5 U.S.C. § 552a(j)]. Also, pursuant to Section (j)(2) of the Act, records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Fraud Branch of the Office of Security and by the Inspector General may be exempted from the requirements of any part of the Act except

subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent necessary to assure the effective completion of the investigative and judicial processes.

n3 The government at appellate argument also represented that the internal review records sought by Seldowitz were destroyed in January 1998. Again, this is a matter for discovery, and Seldowitz is not required to simply accept an affidavit from a government official stating that the records no longer exist.

n4 Seldowitz also argues that the exemptions must be asserted at the administrative level and may not be asserted in the course of judicial proceedings. We reject this argument. In similar cases we have held that an agency does not waive exemptions "by not raising them during the administrative process." Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (dealing with FOIA exemptions).

CIVIL ACTION No. 99-1031

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA ALEXANDRIA DIVISION

STUART M. SELDOWITZ,
Plaintiff,

v.

THE OFFICE OF THE
INSPECTOR GENERAL, U. S.
Department of State,
Defendant.

October 29, 1999

ORDER

THIS matter is before the Court on defendant's Motion to Dismiss. For the reasons stated below and in open court, defendant's Motion to Dismiss is GRANTED as to Counts I and II, but DENIED as to Count III.

1. On a rule 12(b) (6) motion to dismiss, the factual allegations of the complaint must be accepted as true, and the complaint and its allegations considered in light most favorable to the non-moving party. See *Mylan Lab. Inc. v. Matkari,* 7 F.3d 1130 (4th Cir. 1993)

2. Pursuant to Rule 12(b) (1), a claim may be dismissed for lack of subject matter jurisdiction. Where subject matter jurisdiction is challenged, the factual allegations are assumed true. See *Virginia v. United States.* 926 F. Supp.

537 (E.D. Va. 1995). The court may look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether subject matter jurisdiction exists. *Id.*

3. Defendant asserts that this Court lacks subject matter jurisdiction because of the release clause in the settlement agreement and because the claim is time barred. Initially, the Court will address the statute of limitations issue.

4. As the time limits of the Privacy Act are jurisdictional, the plaintiff bears the burden of establishing that they have been met. See *Bowyer v. United States Department of Air Force*, 875 F.2d 632, 635 (7th Cir. 1989)

5. The Privacy Act requires governmental agencies to maintain accurate records and provides a civil remedy for violations of the Act. 5 U.S.C. § 552a, (g) (C). The Act sets a two-year statute of limitations to enforce liability.

An action to enforce any liability created under this section may be brought in the district court . . . within two years from the date on which the cause of action arises, except *that where an agency has materially and willfully misrepresented* any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time *within two years after discovery* by the individual of the misrepresentation.

*Id. at* § 552a(g) (5) (emphasis added).

6. In the present case, the argument hinges on whether Defendant's alleged misrepresentations tolled the period and when Plaintiff discovered the misrepresentation.

7. While the Fourth Circuit has not ruled on the issue, the Seventh Circuit has held that despite a material and willful misrepresentation the focus should still be on when the plaintiff knew or had reason to know of an error in maintaining the records. See *Bowyer*, 875 F.2d at 637. The Court found that this test incorporates the willful representation provision. *Id.*

8. Plaintiff relies on *Tijernia v. Walters*, 821 F.2d 789 (D.D.C. 1987) . In dictum, the court stated that a willful misrepresentation extended the normal limitations period until actual discovery of the misrepresentation. *Id.* at 798. The court reasoned that the extension would prevent the government from escaping liability where it purposefully misrepresented information that could establish it already had violated the Act. *Id.*

9. However, under both the *Bowyer* and *Tijerina* analysis, the limitations period lapsed prior to Plaintiff bringing this suit.

10. The gravemen of Plaintiff's Amended Complaint is that as a result of inaccurate and incomplete information contained in the government files, he suffered the adverse decision of the Office of Inspector General ("OIG") of the United States Department of State. The OIG referred the matter of his request for expense reimbursement as a False Claim Act allegation to the United States Attorney's Office. The Complaint alleges that the agency provided unannotated receipts (reflecting the full amount of the rent) to the U.S. Attorney's Office while Plaintiff had turned in annotated receipts (reflecting only a portion of the rent). The United States Attorney's Office threatened a False Claim Act lawsuit against Plaintiff and presented him with the unannotated vouchers. Plaintiff considered these records and decided to enter into a compromise settlement of the False Claims Act

suit, whereby Plaintiff agreed to pay $15,000 to the government. Plaintiff also expended $5,000 in attorney's fees and cost. While these are serious allegations against the government requiring deliberate consideration, Plaintiff's claim rriust fail under the Privacy Act because it was not commenced within the statutory limitations period.

11. Plaintiff admits that he was shown a copy of the *unannotated* records in June 1995. See *Amended Complaint, ¶¶ 26, 28.* He acknowledges that he received a copy of the *annotated* vouchers from the National Finance Center in October 5, 1995. *Id. at ¶ 36.* The Amended Complaint also alleges that "upon receiving the above described voucher with attachments, Mr. Seldowitz became aware that the U.S. Attorney's Office had possession of incorrect records unannotated rental receipts." *Id.* at ¶ 37. These alleged facts reflect Plaintiff's knowledge of inaccurate records as of October 1995 when he knew that unannotated and annotated receipts existed.

12. Plaintiff focuses on the fact that on September 25, 1995, he requested that his then-attorney give him a copy of the vouchers provided by OIG to the U.S. Attorney's Office. *Id* at ¶ 38. His attorney received a copy of the voucher record from the government in September 1995. The attorney delayed sending a copy of them to his client until April 1996. The law presumes Plaintiff had an awareness of his claims through his attorney when the attorney received the record in September 1995. *See Leorna v. United States Dept. of State*, 105 F.3d 548, 551 (9th Cir. 1997) (stating that once a claimant retains counsel, tolling ceases because the plaintiff has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law's requirements)

13. Even based on the face of the pleadings, Plaintiff had knowledge of the alleged inaccuracies contained in the

records at least as of October 1995. Plaintiff did not need to have physical possession of the records that the U.S. Attorney's Office received from the OIG. See *Bowyer*, 875 F.2d at 636. Plaintiff failed to file the Complaint until April 9, 1998 and he did not serve the Complaint until July 1998--more than two and a half years after he actually knew of the existence of the allegedly inaccurate records.

14. As the action was commenced more than two years after the cause of action accrued, Counts I and II are dismissed for lack of subject matter jurisdiction.

15. In light of the foregoing, the issues of the release clause or fraudulent inducement regarding the release are moot. Nevertheless, Defendant alleges that the Court lacks jurisdiction due to the Settlement Agreement which has a release term. However, subject matter jurisdiction is proper where there is a federal question or diversity of citizenship. In this case, the Privacy Act presents a federal question, so jurisdiction is proper. Furthermore, the matter cannot be addressed as a 12(b) (6) motion to dismiss as the release clause was not referenced in the Amended Complaint.

16. Defendant moves to dismiss Count III (alleging that Defendant refused to amend alleged inaccuracies in the records) because Plaintiff failed to exhaust administrative remedies. The exhaustion doctrine does not bar suits for damages under this Act. See *Diederich v. Dept. of the Army*, 878 F.2d 646, 648 (2d Cir. 1989) (holding that exhaustion of administrative remedies was not required where the Army stalled plaintiff's correction before an appeals board for several months).

17. An aggrieved individual may seek amendment of agency records under the Privacy Act. *Id.* at § 552a(g) (1) (A). The procedures under subsection (d) (3) require that the agency completes the review process and makes a

determination within 30 working days after the individual requests such review, unless for good cause shown. *See Id.* at §552a(d) (3).

18. In March 1998, Plaintiff requested an amendment of his voucher record. In May 1998, Plaintiff repeated his request. The IRM Programs and Services office notified Plaintiff that action would not be taken until completion of the President's Council on Integrity and Efficiency's review. Plaintiff appealed. The Appeals Office of IRM Programs and Services sent Plaintiff a letter suspending the appeal until completion of the investigation.

19. Requiring Plaintiff to further exhaust contradicts the plain language of the statute as well as undercuts Congress's clear intent to provide speedy disposition of these claims. *See Diederich,* 878 F.2d at 648. The motion to dismiss Count III is denied.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 29 day of October, 1999.

Gerald Bruce Lee,
United States District Judge

CIVIL ACTION No. 99-1031

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA ALEXANDRIA DIVISION

STUART M. SELDOWITZ,
Plaintiff,

v.

THE OFFICE OF THE
INSPECTOR GENERAL, U. S.
Department of State,
Defendant.

December 8, 1999

**ORDER**

THIS matter is before the Court on Defendant's Motion to Dismiss or for Summary Judgment. Plaintiff Stuart M. Seldowitz filed this Privacy Act action seeking to amend records of his claims for reimbursement that are contained in Defendant Office of Inspector General of the U.S. Department of State ("OIG"). . 5 U.S.C. § 552a(d) (2). Defendant moves for summary judgment on two theories: 1) the investigatory records of the OIG are exempt from the requirements of the Privacy Act under § 552a(j) (2) or (k) (2); and 2) the settlement agreement entered into between the parties bars the litigation. For the reasons stated in open court and below, Defendant's motion for summary judgment is

GRANTED.

1. Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted where there exists "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." In reviewing the evidence, the court must view the facts and inferences to be drawn in the light most favorable to the nonmoving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475* U.S. *574 (1986).* Initially, the moving party bears the responsibility of stating the basis of the motion and demonstrating the absence of a genuine issue. See *Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).* Rule 56(e) requires the nonmoving party to go beyond the pleadings, and by his own affidavits, or by depositions, answers to interrogatories, and admissions, designate specific facts showing there is a genuine issue for trial. See *id.* at 324.

2. The Privacy Act requires governmental agencies to maintain accurate records and to safeguard individuals from capricious dissemination of personal information by the government. See 5 U.S.C. § 552a. An aggrieved individual may seek amendment of agency records. See *id.* § 552a(d)(2). However, the Privacy Act grants law enforcement agencies and components thereof authority to exempt their investigatory system of records from subsection (d) (2)

3. Specifically, subsection (j) provides a general exemption. In pertinent part, it states that the head of any agency may promulgate rules to exempt any system of records:

maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . and which consists of
(B) information compiled for the purpose of a criminal investigation .

5 U.S.C. § 552a(j) (2)

4. Similarly, subsection (k) provides for specific exemptions. In pertinent part, subsection (k) (2) states that the head of any agency may promulgate rules to exempt any system of records within the agency if the system is investigatory material compiled for law enforcemmt purposes, other than material within the scope of subsection (j)(2) of this section. *See* § 552a(k)(2).

5. An agency exercising its election to exempt must promulgate exemption rules and state the reasons why the systems of records are to be exempted. *See* 5 U.S.C. § 552a(j).Consistent with subsections (j) and (k), the Department of State has promulgated a rule exempting the systems of records maintained by the OIG from amendment pursuant to §552a(d) (2) . *See* 22 C.F.R. 171.32.

6. Two portions of the regulation address the § 552a(j) (2) exemption of records maintained by the OIG. See *id.* The regulation provides "Also, pursuant to Section (j) (2) of the Act, records compiled . . . by the inspector [sic] General may be exempted." *Id.* § 171.32(h). Thus, the rile is explicit. The rule also sets forth the reasons for exemption: such exemption is allowed to the "extent necessary to assure the effective completion of the investigative and judicial processes." See *id.*

Additionally, 22 C.F.R. § 171.32(i) states

Portions of the following systems of records are exempted under 5 U.S.C. [sic] 552a(j) to the extent authorized and determined by the agency originating the records. The names of the systems correspond to those published in the Federal Register by the Department. . . . Records of the Inspector General and Automated Individual Cross-Reference System. STATE- 53

7. In addition, 22 § C.F.R. 171.32(j) (2) specifically applies the § 552a(k) (2) exemption to the OIG records.

The reasons for invoking the exemptions are to prevent individuals the subject of investigation from frustrating the investigatory process, to insure the integrity of law enforcement activities, to prevent disclosure of investigative techniques . .

22 C.F.R. 171.32(j) (2).

8. The Court will address the records compiled by the Office of Inspector General, Office of Investigation ("OIG/OIV") which Plaintiff seeks to have the Department of State amend.

9. In this case, both sides agree that the OIG is an agency whose principal function is law enforcement. The OIG is responsible for examining allegations of fraudulent claims. OIG was investigating Plaintiff for a possible False Claims Act violation for submitting false claims for expense reimbursement when Plaintiff was a State Department employee. Plaintiff seeks to amend the OIG investigation records. However, these records were compiled with an eye toward prosecution. Furthermore, Kathy Friebel, Acting Inspector General for Investigations, Office of Inspector General, has reviewed the investigatory files as they relate to Plaintiff and certified that they were compiled for the purpose of criminal investigation. See *Defendant's Exhibit 3, Affidavit of Kathy Friebel.* Thus, the Court finds that the records at issue fall within the scope of (j) (2) and are properly exempted.

10. Plaintiff asserts three arguments as to why subsection (j) (2) should not apply. Each will be addressed in turn.

11. First, Plaintiff contends that the investigation is complete and the judicial process never commenced. Thus, the rationale for the exemption no longer applies.

12. However, no case stands for the proposition that the records lose their exempted status based on completion of the investigation. See *Aquino v. P.W. Stone*, 957 F.2d 139 (4th Cir. 1992). In *Aquino*, the Fourth Circuit upheld an agency's refusal to amend a report of criminal investigation as the report was exempted. See *id.* at 143. At the time the exemption was asserted, the investigation was closed and no judicial prosecution was pursued. See *id.* at 141. The Court expressly rejected the argument that exemption was considered on a case by case approach instead of applying to a system of records. See *id.* at 142. Furthermore, other circuits have found that subsection (j) (2) does not require that a regulation's rationale for exempting a record apply in each case. See *Wentz v. Dept. of Justice*, 722 F.2d 335, 337-39 (7th Cir. 1985) (holding that a form prepared by the Assistant United States Attorney was exempt from both disclosure and amendment provisions even where the rationale for exemption was to avoid access and the prisoner already had been given a copy of the form).

13. Second, Plaintiff contends that OIG has no right to claim the exemption as it is vested in authorized officials of the Department of State. Plaintiff provides no evidence to substantiate this claim. The regulation itself does not limit the assertion of the exemption. Furthermore, the agency is not precluded from asserting new exemptions during litigation. See *Young v. Central Intelligence Agency*, 972 F.2d 536, 538-39 (4th Cir. 1992) (holding that the agency does not waive Freedom of Information Act exemption by not raising it at the administrative level). In this case, the agency has not considered the merits of Plaintiff's claim to assert a defense. See *Defendant's Exhibit 8, Letter from Charles Lahiguera,*

*Appeals Officer, to Andrew Grosso* ("As the case is still in process, there is no adverse determination ripe for administrative appeal.")

14. Third, Plaintiff argues that Defendant has waived exemption by disclosing certain documents. The case law is to the contrary. See *Aquino, supra,* 957 F.2d at 143. In that case, the Fourth Circuit upheld the exemption even though the plaintiff seeking the amendment and a third party, the parole board, had been given copies of the exempted documents. See *id.* The case relied upon by Plaintiff, *Powell v. Department of Justice,* can be distinguished because it only pertained to a correction of an address on the documents and no substantive changes. 851 F.2d 394, 395(D.C. Cir. 1988)

15. The Court will now turn to the documents which Plaintiff identifies as Audit Reports and Internal Review Report.

16. The Court finds that these documents do not fall in the system of records governed by the Privacy Act. The access provision under the Privacy Act is confined to records of information within a system of records. See S U.S.C. § 552a(d) (1). See *also William v. Dept. of Veteran Affairs,* 104 F.3d 670, 673 (4th Cir. 1997) (holding that the access provision is confined to records or information within a system of records). "Records" are information about an individual. See *id.* at § 552a(a) (4). "System of records" is a group of records from which information is retrieved by the name of an individual or other identifying particular assigned to an individual. See *id.* at § 552a(a) (5).

17. Based on Plaintiff's own definition, neither the Audit Reports or the Internal Review Report fit these definitions. See *also Defendant's Exhibit 6, Declaration of M. Milton MacDonald, Assistant Inspector General for Audits, Office of Audits, Office of Inspector General* (stating that the records

are not indexed or retrievable by the name or personal identifier of an individual and that Plaintiff was not the subject matter of the audit). See *also Defendant's Exhibit 7, Declaration of Stephen D. Dingbaum, Deputy Assistant Inspector General for Security and Intelligence Oversight* (stating that the records are not indexed or retrievable by the name or personal identifier of an individual and that Plaintiff is not mentioned in the reports)

18. Even if the Audit Reports and Internal Review Records were covered, § 552a(k) (2) would provide an exemption. The Audit Reports are prepared for law enforcement purposes. Furthermore, the exemption covers investigations of agency employees to determine if any administrative action should be taken. See *Voitti*, 902 F. Supp. at 1335 ("[t]here is no requirement under the "law enforcement" exception that criminal charges result from the investigation. The plain language of the exemption states that it applies to the purpose of the investigations, not to the result.); See *also Strang v. U.S. Arms Control and Disarmament Agency*, 864 F.2d 859, 862 (D.C. Cir. 1989) (holding that the law enforcement requirement is not limited to crimi..al law enforcement, but includes national security laws as well) . See *also Frank v.U.S. Dept. of Justice*, 480 F. Supp. 596 (D.D.C. 1979). Thus, the Audit Reports and Internal Review Records would still be exempt.

19. Thus, the Court holds that the documents which Plaintiff seeks to amend are exempt from subsection (d) (2) of the Privacy Act. The Court will not address the issue of whether the Settlement Agreement bars the present litigation.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 8 day of December, 1999.

Gerald Bruce Lee,
United States District Judge

No. 00-1142

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

September 25, 2000, Argued

November 13, 2000, Decided

STUART M. SELDOWITZ,
Plaintiff-Appellant,

v.

THE OFFICE OF THE INSPECTOR GENERAL, U. S. Department of State, Defendant-Appellee.

FILED January 9 ,2001

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing

For the Court
S/Patricia S. Connor
Clerk

22 cfr 171.32

*** THIS SECTION IS CURRENT THROUGH THE MARCH 27, 2001 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 22 -- FOREIGN RELATIONS

CHAPTER I -- DEPARTMENT OF STATE

SUBCHAPTER R -- ACCESS TO INFORMATION

PART 171 -- AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

SUBPART D -- PRIVACY PROVISIONS

22 CFR 171.32

§ 171.32 Exemptions.

Portions of systems of records maintained by the Department are authorized to be exempted from a limited number of provisions of the Privacy Act. In utilizing these exemptions, however, the Department contemplates exempting only those portions of systems necessary for the proper functioning of the Department and which are consistent with the Privacy Act and these regulations. The following exemptions are authorized under 5 U.S.C. 552a(j) and (k):

(a) Records specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and in fact, properly classified pursuant to such executive order (k)(1);

(b) Investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C.

552a(j)(2): Provided, however, That if any individual is denied any right, privilege, or benefit for which she or he would otherwise be eligible as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of the regulations, under an implied promise that the identity of the source would be held in confidence (k)(2);

(c) Records maintained in connection with providing protective services to the President of the United States or other individuals, pursuant to 18 U.S.C. 3056 and 22 U.S.C. 2666 (k)(3);

(d) Records required by statute to be maintained and used solely as statistical records (k)(4);

(e) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, nominations or referrals to international organizations, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of these regulations, under an implied promise that the identity of the source would be held in confidence (k)(5);

(f) Testing or examination material used solely to determine individual qualification for appointment or promotion to the Federal service which would compromise the objectivity or fairness of the testing or examinations process if disclosed (k)(6); or

(g) Evaluation material used to determine potential of an individual for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of these regulations, under an implied promise that the identity of the source would be held in confidence (k)(7); or

(h) Records originated by another agency when that agency has determined that the record is exempt under 5 U.S.C. 52a (j). Also, pursuant to Section (j)(2) of the Act, records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Fraud Branch of the Office of Security and by the inspector General may be exempted from the requirements of any part of the Act except subsections (b), (c)(1) and (2), (e)(4) (A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent necessary to assure the effective completion of the investigative and judicial processes.

(i) Portions of the following systems of records are exempted under 5 U.S.C 552a(j) to the extent authorized and determined by the agency originating the records. The names of the systems correspond to those published in the Federal Register by the Department.

System Name: STATE DEPT.

Consular Service and Assistance Records. STATE-5.

Coordinator for Combatting Terrorism Records. STATE-6.

External Research Records. STATE-10.

Extradition Records. STATE-11.

Intelligence and Research Records. STATE-15.

International Organizations Records. STATE-17.

Law of the Sea Records. STATE-19.

Overseas Records. STATE-25.

Passport Records. STATE-26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Security Records. STATE-36.

Visa Records. STATE-39.

Munitions Control Records. STATE-42.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.

(j) Portions of the following systems of records are exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (3) and (4), (G), (H), and (I), and (f). The names of the systems correspond to those published in the Federal Register by the Department.

(1) Exempt under 5 U.S.C. 552a(k)(1). The reason for invoking the exemption is to protect the material required to be kept secret in the interest of national defense and foreign policy.

Statements by Principals during the Strategic Arms Limitation Talks, Mutual Balanced Force Reduction negotiations, and the Standing Consultative Committee. ACDA-4.

Board of Appellate Review Records. STATE-2.

Consular Service and Assistance Records. STATE-5.

Coordinator for Combatting Terrorism Records. STATE-6.

External Research Records. STATE-10.

Extradition Records. STATE-11.

Foreign Assistance Inspection Records. STATE-48.

Intelligence and Research Records. STATE-15.

International Organizations Records. STATE-17.

Law of the Sea Records. STATE-19.

Overseas Records. STATE-25.

Passport Records. STATE-26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Security Records. STATE-36.

Visa Records. STATE-39.

Berlin Document Center. STATE-41.

Munitions Control Records. STATE-42.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.

Records of the Office of the Assistant Legal Adviser for International Claims and Investment Disputes. STATE-54.

(2) Exempt under 5 U.S.C. 552(a)(k)(2). The reasons for invoking the exemptions are to prevent individuals the subject of investigation from frustrating the investigatory process, to insure the integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the confidence of foreign governments in the integrity of the procedures under which privileged or confidential information may be provided; and to protect the confidentiality of sources of information.

Security Records. ACDA-3. Provided, however, that if any individual is denied any right, privilege, or benefit to

which the individual would otherwise be entitled by Federal law, or for which the individual would otherwise be eligible, as a result of the maintenance of such material, such material will be provided to such individual, except to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, if furnished to the Government prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

Board of Appellate Review Records. STATE-2.

Consular Service and Assistance Records. STATE-5.

Coordinator for Combatting Terrorism Records. STATE-6.

Extradition Records. STATE-11.

Foreign Assistance Inspection Records. STATE-48.

Intelligence and Research Records. STATE-15.

Overseas Records. STATE-25.

Passport Records. STATE-26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Security Records. STATE-39.

Visa Records. STATE-39.

Munitions Control Records. STATE-42.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.

Records of the Office of White House Liaison, STATE-34

Garnishment of Wages Records. STATE-61.

(3) Exempt under 5 U.S.C. 552(a)(k)(3). The reason for invoking this exemption is to preclude impairment of the Department's effective performance in carrying out its lawful protective responsibilities under 18 U.S.C. 3056 and 22 U.S.C. 1666.

Consular Service and Assistance Records. STATE-5.

Extradition Records. STATE-11.

Intelligence and Research Records. STATE-15.

Overseas Records. STATE-25.

Passport Records. STATE-26.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Security Records. STATE-36.

Visa Records. STATE-39.

(4) Exempt under 5 U.S.C. 552a(k)(4). The reason for invoking this exemption is to avoid needless consideration of records which are used solely for statistical purposes and from which no individual determinations are made.

Foreign Service Institute Records. STATE-14.

Personnel Payroll Records. STATE-30.

Personnel Records. STATE-31.

(5) Exempt under 5 U.S.C. 552a(k)(5). The reasons for invoking this exemption are to insure the proper functioning of the investigatory process, to insure effective determination of stability, eligibility and qualification for employment and to protect the confidentiality of sources of information.

Security Records. ACDA-3. This system contains investigatory materials compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information which is exempt from disclosure by the Act (5 U.S.C. 552a(k)(5)), but only to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or if furnished to the Government prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

Board of the Foreign Service Records. STATE-3.

Equal Employment Opportunity Records. STATE-9.

Foreign Assistance Inspection Records. STATE-48.

Foreign Service Grievance Board Records. STATE-13.

Legal Adviser Personnel Records. STATE-20.

Overseas Records. STATE-25.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personnel Records. STATE-31.

Security Records. STATE-36.

Senior Personnel Appointment Records. STATE-47.

Records of the Inspector General and Automated Individual Cross-Reference System. STATE-53.

(6) Exempt under 5 U.S.C. 552(k)(6). The reasons for invoking this exemption are to prevent the compromise of testing or evaluation material used solely to determine individual qualifications for employment or promotion, and

to avoid giving unfair advantage to individuals by virtue of their having access to such material.

Foreign Service Institute Records. STATE-14.

Personnel Records. STATE-31.

(7) Exempt under 5 U.S.C. 552a(k)(7). The reason for invoking this exemption is to prevent access to such material maintained from time to time by the Department in connection with various military personnel exchange programs.

Overseas Records. STATE-25.

Personality Cross Reference Index to the Secretariat Automated Data Index. STATE-28.

Personality Index to the Central Foreign Policy Records. STATE-29.

Personnel Records. STATE-31.

(k) Portions of certain documents in the following systems of records are exempted pursuant to the provisions of 5 U.S.C. 552a (j) and (k) from subsections (c) (3) and (4); (d); (e)(4), (G), (H), and (f) of 5 U.S.C. 552a.

Public Affairs Records. STATE-35.

Privacy Act Requests Records. STATE-40.

HISTORY: [45 FR 58108, Sept. 2, 1980; 45 FR 62426, Sept. 19, 1980, as amended at 56 FR 6969, Feb. 21, 1991; 59 FR 2521, Jan. 18, 1994; 61 FR 68148, 68149, Dec. 27, 1996; 64 FR 10949, Mar. 8, 1999; 64 FR 18808, Apr. 16, 1999]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 551 et seq., 552, 552a; 5 U.S.C. App. 201; Pub. L. 105-277, 112 Stat. 2681 et seq. E.O. 12600, 52 FR 19825, 3 CFR, 1995 Comp., p. 333.

NOTES: [EFFECTIVE DATE NOTE: 64 FR 18808, Apr. 16, 1999, amended paragraphs (j)(1), (j)(2), and (j)(5), effective Apr. 1, 1999.]

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: U.S. Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.

International Trade Administration, Department of Commerce: See Commerce and Foreign Trade, 15 CFR chapter III.

Foreign-Trade Zones Board: See Commerce and Foreign Trade, 15 CFR chapter IV.

Immigration and Naturalization Service, Department of Justice: See Aliens and Nationality, 8 CFR chapter I.

Taxation pursuant to treaties: See Internal Revenue, 26 CFR 1.894-1.

2029 words

56 fr 7071

DEPARTMENT OF STATE

Office of Diplomatic Security

[Public Notice 1298]

*56 FR 7071*

February 21, 1991

Privacy Act of 1974; Altered System of Records

TEXT: Notice is hereby given that the Department of State proposes to alter an existing system of records, STATE-53, pursuant to the provisions of the Privacy Act of 1974 *(5 U.S.C. 552a*(o)) and the Office of Management and Budget Circular No. A-130, Appendix I. The Department's report was filed with the Office of Management and Budget on October 4, 1990.

It is proposed that the current system "Records of the Inspector General of the Department of State and the Foreign Service" be renamed "Records of the Inspector General and Automated Individual Cross-Reference System." Also proposed are revisions and/or additions to the system location, the categories of individuals covered by the system, the authority for maintenance of the system, categories of records in the system, routine uses, retrievability and safeguards, and retention and disposal. These changes to the existing system description are proposed in order to more accurately reflect the Office of the Inspector General's recordkeeping system, the enlargement of the scope of its mandate, and a reorganization of its activities and operations. The introduction of the automated individual cross-reference

index is designed to facilitate the management of the name-retrievable information maintained in support of the Inspector General's programs.

Any persons interested in commenting on the altered system of records may do so by submitting comments in writing to Frank M. Machak, Acting Director, Office of Freedom of Information, Privacy, and Classification Review; Room 1239, Department of State, 2201 C Street, NW., Washington, DC 20520.

The altered system, the "Records of the Inspector General and Automated Individual Cross-Reference System, STATE-53," will read as set forth below.

Dated: October 4, 1990.

For the Secretary of State.
Sheldon J. Krys,

Assistant Secretary for Diplomatic Security.

STATE-53

System name:

Records of the Inspector General and Automated Individul Cross-Reference System.

Security classification:

Classified.

System location:

Department of State, 2201 C Street, NW., Washington, DC 20520, and Department annexes.

Categories of individuals covered by the system.

Present and former employees of the Department of State (including foreign nationals); individuals (or firms) doing business with State, including contractors, grantees or others funded by the Department; individuals who have purchased USG employees' property overseas; members of the foreign

affairs community who come under the direction, coordination and supervision of chiefs of missions; other individuals whose association with the Department relates to the alleged violations of the Department's rules of conduct, the Civil Service merit system, or to any other criminal or civil misconduct which affects the integrity or facilities of the Department of State; witnesses, complainants, confidential or nonconfidential informants, suspected defendants; or parties who have been identified by the Office of the Inspector General or by other agencies, constituent units of State, and members of the general public in connection with the authorized functions of the Inspector General.

authority for maintenance of the system:

The Foreign Service Act of 1980 *(22 U.S.C. 3901)* in accordance with the Department of State Authorization Act for Fiscal year 1986; and the Inspector General Act of 1978 *(5 U.S.C. Appendix 3)*.

Categories of records in the system:

Investigatory material. The Automated Individual Cross-Reference System summarizes results of investigations, inspections, audits, or other inquiries conducted by the Office of the Inspector General and its recommendations as they pertain to individuals, as well as Inspectors' Evaluation Reports. Reports of investigations conducted by other Departmental, Federal, State and local investigative agencies under the direction of, or on behalf of, the Inspector General. Inspectors' Evaluation Reports on chiefs of missions, deputy chiefs of missions, principal officers at posts, assistant secretaries, and deputy assistant secretaries.

routine uses of records maintained in this system, including categories of users and the purposes of such uses:

The information contained in the Records of the Inspector General and the Automated Individual Cross-Reference System is collected and maintained in the administration of

the Department of State, Federal Criminal Statutes, Uniform Code of Military Justice, Executive Orders, and the Code of Federal Regulations to oversee and enforce Federal laws and regulations. Material gathered is used in the enforcement of the aforementioned laws and regulations. These records may be disseminated, depending on jurisdiction to Department on jurisdiction to the following:

(1) Department of State officials in the administration of their responsibilities;

(2) Appropriate committees of the Congress in furtherance of their respective oversight functions;

(3) Private international or other organizations having any source from which information is requested in the course of investigation to the extent necessary to identify the individual or individuals, to inform the source of the nature and purpose of the investigation, and to identify the type of information requested;

(4) A Federal, State, local, or foreign agency or other public authority that investigates or prosecutes or assists in investigation or prosecution of such violation, or enforces or implements or assists in enforcement or implementation of the statute, rule, regulation or order;

(5) A Federal, State, local or foreign agency or other public authority, or professional organization, maintaining civil, criminal, or other relevant enforcement records or other pertinent records, such as current licenses, or to a consumer reporting agency, in order to obtain information relevant to an agency investigation, audit, or other inquiry, or relevant to a decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the establishment of a claim, or the initiation of administrative, civil, or criminal action;

(6) A Federal, State, local, or foreign agency or other public authority, or professional organization, if relevant to

the recipient's hiring or retention of an employee or other personnel action, the issuance of a security clearance, the letting of a contract, the issuance of a license, grant or other benefit, the establishment of a claim, or the initiation of administrative, civil, or criminal action;

(7) Any private or public source, witness, or subject from which information is requested in the course of a legitimate agency investigation, audit, or other inquiry to the extent necessary: to identify an individual; to inform the source, witness, or subject of the nature and purpose of the investigation, audit or other inquiry; and to identify the information requested;

(8) An attorney or other designated representative of any source, witness, or subject described in paragraph 7 only to the extent that the information would be provided to that category of individuals themselves in the course of an investigation, audit, or other inquiry;

(9) The Department of Justice when the Department of State or any component thereof, or any employee of the Department in his or her official capacity, or any employee of the Department in his or her individual capacity where the Department of Justice has agreed to represent the employee, or the United States, where the Department of State determines that litigation is likely to affect the Department or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the Department of State to be relevant and necessary to the litigation;

(10) In a proceeding before a court or adjudicative body, when the agency, or any component thereof, or any employee of the agency in his or her official capacity, or any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee, or the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to

litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation;

(11) To a member of Congress at the sole discretion of the Inspector General upon a determination of the propriety of such a disclosure and only for such purposes as authorized by the statutory mandate of the Inspector General;

(12) The Department of Justice for the purpose of obtaining its advice;

(13) The Office of Management and Budget for the purpose of obtaining its advice regarding agency obligations under the Privacy Act, or in connection with the review of private relief legislation;

(14) In response to a subpoena issued by a Federal agency having the power to subpoena records of other Federal agencies;

(15) A grand jury agent pursuant either to a Federal or State grand jury subpoena, or to a prosecution request that such record be released for the purpose of its introduction to a grand jury;

(16) A Federal agency responsible for considering suspension or debarment action where such record would be relevant to such actior;

(17) An entity or person, public or private, where disclosure of the record is needed to enable the recipient of the record to take action to recover money or property of the United States Department of State, where such recovery will accrue to the benefit of the United States, or where disclosure of the record is needed to enable the recipient of the record to take appropriate disciplinary action to maintain the integrity of the program or operations of the Department of State;

(18) A Federal, State, local, or foreign agency, or other public authority, for use in computer matching programs to

prevent and detect fraud and abuse in benefit programs administered by any agency, to support civil and criminal law enforcement activities of any agency and its components, and to collect debts and overpayments owed to any agency and its components;

(19) A public or professional licensing organization when such record indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of an individual who is licensed or who is seeking to become licensed and,

(20) Debt collection contractors for the purpose of collecting delinquent debts as authorized by law.

Also see the "Routine Uses" paragraph of the Prefatory Statement published in the Federal Register *(42 FR 49699,* September 27, 1977).

policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

storage:

Hard copy, electronic media.

retrievability:

Investigatory case files and Inspectors' Evaluation Reports are retrievable by an individual's name.

safeguards:

All employees of the Department of State have undergone a thorough background security investigation. Access to the Department of State and its annexes is controlled by security guards, and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. All records containing personal information are maintained in secure file cabinets or in restricted areas, access to which is limited to authorized personnel. Access to

computerized files is passwork protected and under the direct supervision of the system manager. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular ad hoc monitoring of computer usage. Inspector General reports and investigative files are disseminated only by the Inspector General and only to the Department of Justice, Congressional oversight committees, and/or the immediate Department principals or offices with a clear need-to-know the matter being reported. No secondary distribution is permitted without the expressed written permission of the Inspector General.

retention and disposal:

Rentention of these records varies depending upon the specific kind of record involved in accordance with published schedules of the Department of State. More specified information may be obtained by writing to the Director, Office of Freedom of Information, Privacy, and Classification Review; Room 1239, Department of State, 2201 C Street, NW., Washington, DC 20520.

system manager and address:

The Inspector General, Office of the Inspector General, Room 6817, Department of State, 2201 C Street, NW., Washington, DC 20520.

notification procedure:

Individuals who have reason to believe that the Records of the Inspector General and Automated Individual Cross-Reference System might have information pertaining to them, should write to the Director, Office of Freedom of Information, Privacy, and Classification Review; Room 1239, Department of State, 2201 C Street, NW., Washington, DC 20520. The individual must specify that he/she wishes the Records of the Inspector General and Automated Individual Cross-Reference System to be checked. At a

minimum, the individual should include: name, date and place of birth, current mailing address and zip code, and signature.

record access and amendment procedures:

Individuals who wish to gain access to or amend records pertaining to themselves should write to the Director, Office of Freedom of Information, Privacy, and Classification Review (address above).

record source categories:

These records contain information obtained from interviews, review of records, and authorized investigative techniques.

systems exempted from certain provisions of the act:

Certain records contained within this system of records may be exempted from the requirements of any part of the Act except subsections (b), (c) (1) and (2), (e)(4) (A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent necessary to protect properly classified information and to assure the effective completion of the investigative and judicial processes. See 22 CFR 171.32.
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*** CURRENT THROUGH 106TH CONGRESS, 2ND SESSION ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I. THE AGENCIES GENERALLY

CHAPTER 5. ADMINISTRATIVE PROCEDURE

SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

5 USCS § 552a (2001)

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions

as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer

telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(4) (A)

(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a

timely fashion, or the agency has determined that the fee will exceed $ 250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of

such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

***

(g) Civil remedies.

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably

incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to

establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

***

(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

***

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligiblity, or qualifications for Federal civilian employment, military service, Federal

contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

.....

(v) Office of Management and Budget responsibilities. The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

22 CFR Section 6a.6 Foreign Relations – Exemptions

Portions of systems of records maintained by the Department are authorized to be exempted from a limited number of provisions of the Privacy Act. In utilizing these exemptions, however, the Department contemplates exempting only those portions of systems necessary for the proper functioning of the Department and which are consistent with the Privacy Act and these regulations. The following exemptions are authorized under 5 U.S.C. 552a (j) and (k):

(a) Records specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are, in fact, properly classified pursuant to such Executive order.

(b) Investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S>C. 552(j)(2): Provided, however, That if any individual is denied any right, privilege, or benefit for which he or she would otherwise be eligible as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure would reveal the identity of the source would be held in confidence, or , prior to the effective date of the regulations, under an implied promise that the identity of the source would be held in confidence;

(c) Records maintained in connection with providing protective services to the President of the United States or other individuals, pursuant to 18 U.S.C. 3056;

(d) Records required by statute to be maintained and used solely as statistical records:

(e) Investigatory material complied solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, nominations or referrals to international organizations, or access to classified information, but only to the extent that the disclosure of such material would reveal

the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effectiv3e date of these regulations, under an implied promise that the identity of the source would be held in confidence:

(f) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service which would compromise the objectivity or examination process if disclosed; or

(g) Evaluation material used to determine potential of an individual for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of these regulations, under an implied promise that the identity of the source would be held in confidence; or

(h) Records originated by another when that agency has determined that the record is exempt under 5 U.S.C. 552a(j). Also, pursuant to section (j)(2) of the Act, records compiled by the Command Center, the Passport and Visa Fraud Branch, and the Special Assignments Staff, all of which are components of the Office of Security, may be exempt from the requirements of any part of the Act, except subsections (b); (c) (1) and (2); (e)(4) (A) through (F); (e) (6), (7), (9), (10), and (11); and (i), to the extent necessary to assure the effective completion of the investigative, judicial, and protective processes.

(i) Portions of the following systems of records are exempted under 552a(j) to the extent authorized and determined by the agency originating the records. The names of the systems correspond to those published in the Federal Register on this same date by the Department.

CASE No. 1: 98-CV-00897

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

STUART M. SELDOWITZ,
Plaintiff,

v.

THE OFFICE OF THE
INSPECTOR GENERAL, U. S.
Department of State,
Defendant.

Judge Henry H. Kennedy

August 13, 1998

# AMENDED COMPLAINT

## Preliminary Statement

This complaint is based upon a willful violation of the Privacy Act, 5 U.S.C. § 552a, committed by the Defendant, the OFFICE OF THE INSPECTOR GENERAL OF THE UNITED STATES DEPARTMENT OF STATE, during a False Claim Act investigation of the Plaintiff, Mr. Stuart M. Seldowitz, a Foreign Service Officer of the U.S. Department of State. During this investigation, the Inspector General's Office substituted false documents, these being rental receipts, in place of the true and correct, annotated, receipts initially attached by Mr. Seldowitz to his per diem travel voucher, which voucher was submitted by Mr. Seldowitz to the Department of State for travel compensation. The

Inspector General's Office then utilized these false, unannotated rental receipts in furtherance of a False Claim Act investigation and to unlawfully coerce Mr. Seldowitz into a fraudulently induced settlement.

Jurisdiction and Venue

1. This Court has jurisdiction over this Complaint pursuant to 5 U.S.C. § 552a(g)(1).

2. Plaintiff, Stuart M. Seldowitz ("Mr. Seldowitz"), resides the District of Columbia, and this Complaint is being brought under the Privacy Act, 5 U.S.C. § 552a; venue is therefore proper in this District under 5 U.S.C. § 552a(g)(5).

Parties

3. Plaintiff, Mr. Seldowitz, is a resident and citizen of the United States, and is employed as a Foreign Service Officer with the United States Department of State.

4. The United States Department of State ("the U.S. Department of State" or "the State Department") is a department of the United States, and is responsible for the diplomatic relationship of the United States with foreign countries, and for the negotiation and drafting of treaties between and among the United States and foreign countries.

5. The Foreign Service is corp of professional employees within the State Department who are responsible for the diplomatic representation of the United States in foreign countries and before foreign governments; the function of the Foreign Service includes maintaining diplomatic and consular posts and personnel in foreign countries.

6. The Office of the Inspector General ("OIG") is an

agency of the State Department, and is responsible for the auditing and investigation of allegations of waste, fraud and abuse of funds expended by the State Department and its agencies, officials, employees, and contractors.

Definitions

7. At all times pertinent to this Complaint:

a) A Foreign Service Officer was a person, employed by the State Department and serving in the Foreign Service, whose duties included representing the United States in diplomatic and consular posts in foreign countries.

b) The term "per diem" referred to a method of payment whereby Foreign Service Officers, and other employees of the State Department, were compensated by the State Department for expenses incurred during temporary, official travel.

c) the term "travel voucher" or "voucher" referred to an official document used by employees of the State Department to request and obtain compensation from the State Department for expenses incurred during official travel.

The Privacy Act

8. At all times pertinent to this Complaint, the Privacy Act, 5 U.S.C. § 552a, was in full force and effect, and required that each federal agency which maintained a system of records to:

> (a) Maintain Accurate Records: maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably

necessary to assure fairness to the individual in the determination, pursuant to 5 U.S.C. § 552a(e)(5);

(b) Assure the Accuracy of Records: make reasonable efforts, prior to disseminating any record about an individual to any person other than an agency. . . , to assure that such records are accurate, complete, timely and relevant for agency purposes, pursuant to 5 U.S.C. §552a(e)(6); and,

(c) Establish Appropriate Safeguards for Records: establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained, pursuant to 5 U.S.C. § 552a(e)(10).

9. At all times pertinent to this Complaint, the OIG was subject to the requirements and restrictions of the Privacy Act; this Act required the OIG to handle all records, obtained, used, and maintained pursuant to its audits and investigations of individuals, including employees of the State Department, in accord with such requirements and restrictions.

COUNT ONE

10. The Plaintiff realleges and incorporates by reference the allegations contained in paragraphs one through nine of this Complaint, and further charges:

The Stay in Geneva Switzerland

11. In 1989, Mr. Seldowitz was assigned to the Office of Strategic Nuclear Policy, within the Bureau of Political/Military Affairs ("P/M Bureau") of the State Department.

12. Beginning in January 1990, Mr. Seldowitz served on the United States delegation to the Nuclear and Space Talks ("NST"), in Geneva, Switzerland. Mr. Seldowitz initially served as part of the NST delegation, in Geneva, for approximately four months, from January 27, 1990, to May 26, 1990, and then returned to his home in the United States; thereafter, from June 1990 until March 1991, Mr. Seldowitz returned to Geneva, as part of the NST delegation, on three separate occasions for various periods of time.

13. At all times pertinent to this Complaint, Mr. Seldowitz's wife, Rosalinda Seldowitz, was a civil service employee of the State Department, and, in that capacity, served as secretary to the Deputy Negotiator on the NST's Defense and Space negotiating group, in Geneva, Switzerland.

14. At all times pertinent to this Complaint, beginning February 8, 1990, Mr. Seldowitz and Rosalinda Seldowitz rented the same apartment facilities, and shared those apartment facilities and rental expenses during their stays in Geneva, Switzerland.

15. At all times pertinent to this Complaint, Mr. Seldowitz and Rosalinda Seldowitz were each entitled to per diem compensation: Mr. Seldowitz's per diem was paid by the P/M Bureau, authorized in the amount of approximately $160 per day, and Rocalinda Seldowitz's per diem was paid by the Arms Control Disarmament Agency.

16. During the period February 9, 1990, through May 26, 1990, Mr. Seldowitz and Rosalinda Seldowitz rented a private apartment located at 141 Rue de Lausanne, Geneva, and jointly paid rent for this apartment in a (total) amount of 2,300 Swiss Francs per month. Their landlady for this apartment gave each of them two separate receipts:

(a) the first receipt, dated February 7, 1990, was for the period February 9 through March 31, and included a one month security deposit; this receipt was in the amount of six thousand three hundred twenty-two (6,322) Swiss Francs;

(b) the second receipt, dated May 9, 1990, was for the period May, 1990, and was in the amount of two thousand three hundred (2,300) Swiss Francs; and

(c) Mr. Seldowitz and Rosalinda Seldowitz used the one month security deposit from the receipt dated February 7, 1990, to pay their rent for April 1990.

Submitting the Per Diem Vouchers

17. Prior to May 30, 1990, and while in Geneva, Switzerland, Mr. Seldowitz sought instructions and advice from State Department personnel, including the Executive Secretary of the NST delegation, concerning whether he and his wife should each submit a receipt, having at face value the full amount of their rent, as attachments to theirper diem vouchers. Mr. Seldowitz was told that, under the compensation system in effect at that time, the amount of per diem a traveler was entitled to receive did not depend on the amount which that person actually paid for lodging, and, for this reason, the receipts provided to Mr. Seldowitz and to Rosalinda Seldowitz by their landlady, each indicating the frill amount of the rent jointly paid by them, were acceptable for submission with their separate vouchers.

18. Upon return to the United States, on or about May 26, 1990, Mr. Seldowitz completed his travel voucher for his compensation for his first stay in Geneva, Switzerland. This travel voucher ("the May voucher") was dated May 29, 1990, by Mr. Seldowitz, and was submitted by him to the Executive Office of the Bureau of Political/Military Affairs ("the P/M Bureau") of the State Department, in Washington, D.C., on or about that date. In completing this voucher, Mr. Seldowitz followed the instructions and advice he had received while in Geneva from the aforesaid State Department personnel.

19. Mr. Seldowitz attached to and made part of the May voucher copies of his rental receipts dated February 7, 1990, and May 9, 1990; however, to insure that the United States would have full knowledge of his true rental expenses, Mr. Seldowitz annotated these receipts, as submitted, as follows:

(a) for the receipt dated February 7, 1990, Mr. Seldowitz crossed out the amount of "6,322" in Swiss Francs, and wrote in the amount of "3,161" in Swiss Francs;

(b) for the receipt dated May 9, 1990, Mr. Seldowitz crossed out the amount of "2,300" in Swiss Francs, and wrote in the amount of"1,150" in Swiss Francs.

20. On or about June 1, 1990, Mr. Seldowitz received a telephone call from a person at the Executive Office of the P/M Bureau, who instructed Mr. Seldowitz that: (a) there was no need to annotate receipts; (b) the per diem amount to which a traveler was entitled did not depend upon the amount he or she paid for lodging; and (c) travelers were strongly urged to not annotate their receipts. Following these instructions, Mr. Seldowitz did not annotate future lodging receipts when he submitted subsequent vouchers after future travels to Geneva.

The Investigation by the Office of the Inspector General

21. In or about 1991, the Office of the Inspector General of the Department of State began an investigation into the submission of travel vouchers by members of the United States delegation to the NST; among the individuals whose travel vouchers where examined as part of this investigation were Mr. Seldowitz and Rosalinda Seldowitz.

22. During the period 1991 through 1995, the investigators of the OIG contacted and interviewed Mr. Seldowitz and Rosalinda Seldowitz, and informed these individuals that they were under investigation for submitting false claims against the United States in that they had both submitted vouchers with receipts specifying the full amount of theft monthly rental expenses for the time periods they had spent in Geneva, whereas they had each incurred only one-half of such expenses during those time periods.

23. During the aforesaid investigation, orally and in writing, Mr. Seldowitz informed the OIG that he had been instructed by State Department personnel that he could submit his rental receipts without annotations; that he was elligible for the frill per diem amount for travel regardless of the actual amount of his rent; that he had submitted receipts with his first voucher, annotating these receipts so as to indicate his true share of the rent; and that he had thereafter been instructed by State Department personnel to not annotate such receipts in future submittals of travel vouchers.

24. On or about May 9, 1995, Mr. Seldowitz and Rosalinda Seldowitz received a letter from the United States Attorney's Office for the Eastern District of Virginia ("the U.S. Attorney's Office"), which letter was based upon a report prepared by the OIG and transmitted to the U.S. Attorney's Office. This letter accused Mr. Seldowitz and Rosalinda Seldowitz of willfully submitting false claims to

the State Department in that they had both submitted vouchers which included receipts specifying the full amount of their monthly rental expenses, whereas they had each incurred only one-half of such expenses. This letter further threatened both Mr. Seldowitz and Rosalinda Seldowitz with civil prosecution under the False Claim Act, 31 U.S.C. §§ 3729 et seq., and was accompanied by a draft complaint of a False Claim Act civil suit naming Mr. Seldowitz and Rosalinda Seldowitz as defendants.

25. The above described draft complaint alleged that Mr. Seldowitz had included in his May voucher two rental receipts, described as follows:

> One was dated February 7, 1990, signed on the bottom by [the landlady] and "Stuart Seldowitz" and inscribed, "Today I received from Stuart Seldowitz the amount of 6'322 in Swiss Francs, for the rent of Apt. #53 located at 141 Rue de Lausanne, Geneva. This will cover the remaining of February, until the 31 of March, also this is to include 1 month security deposit of 2,300 S.F. which will be returned when the appartment [sic] is vacated." The other receipt was dated May 9, 1990, signed at the bottom by [the landlady] and "Stuart Seldowitz" and inscribed "Today I received from the U.S. Mission employee S. Seldowitz, the amount of 2,300 Swiss Francs to cover the rent fees for the month of May. The Apartment is located at 141, Rue de Lausanne, #53, Geneva, Switzerland."

26. On or about June 15, 1995, Mr. Seldowitz met with investigators from the OIG and with an Assistant U.S. Attorney, in the U.S. Attorney's Office in Alexandria,

Virginia, for the purpose of discussing the OIG investigation and the aforesaid letter ("the June meeting").

27. During the June meeting, the OIG investigators and the Assistant U.S. Attorney again stated their agencies' threat to bring a civil prosecution against Mr. Seldowitz and Rosalinda Seldowitz. Mr. Seldowitz explained his position, as previously described in paragraph twenty-three above.

28. During the June meeting, Mr. Seldowitz, asked to see the rental receipts which he had submitted to the government. The Assistant U.S. Attorney, in the presence of, and acting as the agent for the investigators from the OIG, showed to him two rental receipts dated February 7, 1990, and May 9, 1990. Neither of these rental receipts were annotated, and both showed the full monthly rent for each pertinent period.

29. Based upon the rental receipts showed him by the Assistant U.S. Attorney, Mr. Seldowitz was convinced that his memory was at fault, and that he had not submitted annotated rental receipts as part of his May voucher.

30 For the reasons set forth in the above paragraph, and to avoid the expense, inconvenience, risk, and the further anguish, humiliation, and harm to his career which a civil prosecution, defense, and trial would necessarily incur, Mr. Seldowitz was convinced to enter into a settlement with the OIG and the U.S. Attorney's Office, and to enter into such settlement within the deadline for acceptance then imposed by those agencies, thereby terminating the OIG investigation and the threatened civil False Claim Act prosecution.

31. Subsequent to the June meeting, Mr. Seldowitz retained the services of an attorney, from a law firm in Washington, D.C., ("the Law Firm") to represent him with regard to the above described matter, including the settlement.

32. Had Mr. Seldowitz not been shown, during the June meeting, copies of the rental receipts, dated February 7 and May 9, 1990, missing the written annotations which clanfied his share of the rental expenses incurred by himself and his wife in Geneva, Mr. Seldowitz would not have entered into the above described settlement.

33. The above described settlement was executed on July 31, 1995. Pursuant to this settlement, Mr. Seldowitz paid to the government fifteen thousand dollars ($15,000).

34. Mr. Seldowitz incurred attorney's fees in the amount of five thousand dollars ($5,000) to the Law Firm for the representation provided by that law firm to Mr. Seldowitz and Rosalinda Seldowitz in the above described matter.

The Discovery of the OIG's Willful Use of False Rental Receipts

35. During the period July 1995, through October 3, 1995, Mr. Seldowitz requested, by telephone from the National Finance Center ("the Finance Center") a copy of the original May voucher, with attachments, which he had submitted on or about May 29, 1990.

36. On or about October 5, 1995, Mr. Seldowitz received the aforesaid voucher, with attachments, from the Finance Center. The rental receipts which accompanied said voucher were annotated in the method and manner described in paragraph nineteen, above.

37. Upon receiving the above described voucher with attachments, Mr. Seldowitz became ?? aware that the U.S. Attorney's Office had possession of incorrect records, these being the aforesaid unannotated rental receipts; however, Mr. Seldowitz was still unaware that the OIG had willfully and intentionally obtained, maintained, and used an incomplete

and inaccurate record, that is, a copy of the May voucher with attachments, in the False Claim Act investigation and prosecution of himself and Rosalinda Seldowitz

38. On or before September 25, 1995, Mr. Seldowitz asked the attorney, who had previously represented him in the above described settlement, if he would ask the U.S. Attorney's Office for copies of the voucher with attachments which had been supplied to that office by the OIG ("the OIG voucher record"). This attorney agreed, and subsequently obtained these documents from the U.S. Attorney's Office.

39. By letter dated April 15, 1996, and postmarked April 17, 1996, the aforesaid attorney transmitted the OIG voucher record to Mr. Seldowitz.

40. The OIG voucher record included false rental receipts, in that the rental receipts included in the OIG voucher record were not annotated; and omitted documents which were part of the May voucher, including the back page of the voucher form itself. Further, (a) pertinent pages in the May voucher, with attachments, obtained from the National Finance Center, were marked with the letters "NFC." whereas the equivalent pages in the OIG voucher record did not bear such marking; and (b) the front page of the voucher form, as included in the OIG voucher record, had been stamped with the word "PROCESS," whereas that page in the May voucher did not bear such stamp.

41. Upon comparing the copies of the May voucher, with attachments, received from the Finance Center with the OIG voucher record, received from the U.S. Attorney's Office, it became apparent to Mr. Seldowitz that the OIG had willfully and intentionally obtained and provided to the U.S. Attorney's Office an incomplete and inaccurate record, specifically, an incomplete and inaccurate copy of the May voucher, with attachments, which Mr. Seldowitz had

submitted to the P/M Bureau, the originals of which were then stored by, and accessible through, the Finance Center.

42. In the aforesaid manner, and at the aforesaid time, Mr. Seldowitz became aware that the OIG had willfully and materially misrepresented the OIG voucher record, to the U.S. Attorney's Office and to Mr. Seldowitz, as being a complete and accurate copy of the May voucher, with attachments, which Mr. Seldowitz had submitted to the P/M Bureau.

43. For the purpose of unlawfully

(a) coercing Mr. Seldowitz into agreeing to, executing, and making payment upon a fraudulently induced settlement agreement, and,

(b) inducing the U.S. Attorney's Office into pursuing and accepting a civil False Claim Act prosecution against Mr. Seldowitz and Rosalinda Seldowitz, and pursuing and accepting the resulting settlement,

the OIG willfully, intentionally, and materially misrepresented, to the U.S. Attorney's Office and to Mr. Seldowitz, the OIG voucher record as being a complete and accurate record of the May voucher, with attachments, which Mr. Seldowitz had submitted to the P/M Bureau on or about May 29, 1990.

The Charge

44. Beginning on an unknown date, and continuing until July 31, 1995, the Office of the Inspector General of the U.S. Department of State, and U.S. Department of State, willfully and intentionally, failed to maintain the above described May voucher, with attachments, including rental receipts, with such accuracy, relevance, and completeness as was necessary

to assure fairness in the determination relating to the character, rights, and opportunities of Mr. Stuart M. Seldowitz that was to be made on the basis of such record, and, consequently, a determination was made which was adverse to Mr. Seldowitz, this being a decision to pursue a civil False Claim Act investigation and prosecution, and to coerce from Mr. Seldowitz a settlement in the amount of fifteen thousand dollars ($15,000); all in violation of 5 U.S.C. § 552a(g)(1)(C) and (4).

45. As a result of the conduct of the Defendant, as described in this Count, the Plaintiff, Stuart M. Seldowitz, suffered actual damages.

COUNT TWO

46. The Plaintiff realleges and incorporates by reference the allegations contained in paragraphs one through nine, and paragraphs eleven through forty-three of this Complaint, and further charges:

47. In furtherance of the aforesaid purpose, described in paragraph forty-three, the OIG willfully and intentionally violated the requirements and restrictions of the Privacy Act, which Act mandated the OIG to:

(a) Maintain Accurate Records, pursuant to 5 U.S.C. § 552a(e)(5);

(b) Assure the Accuracy of Records, pursuant to 5 U.S.C. § 552a(e)(6); and,

(c) Establish Appropriate Safeguards for Records, in violation of 5 U.S.C. § 552a(e)(1 0).

The Charge

48. Beginning on an unknown date, and continuing until July 31, 1995, the Office of the Inspector General of the U.S. Department of State, and the U.S. Department of State, willfully and intentionally, failed to obtain, maintain, and use the above described May voucher, with attachments, including the rental receipts, in accord the above described provisions of the Privacy Act, in such as way as to have an adverse effect upon Mr. Seldowitz, this adverse effect being: (a) an unlawfully coerced settlement, of a wrongfully threatened False Claim Act prosecution, in the amount of fifteen thousand dollars ($15,000); (b) the legal fees expended by Mr. Seldowitz for representation during the negotiation of this settlement, in the amount of five thousand dollars ($5,000); (c) the mental anguish and humiliation of Mr. Seldowitz during the investigation leading to the wrongfully threatened False Claim Act prosecution; and (d) the resulting damage to the reputation, career, and career opportunities of Mr. Seldowitz as a result of the investigation, the threatened civil prosecution, and the unlawfully coerced settlement; each violation of the above described provisions of the Privacy Act being in violation of 5 U.S.C. § 552a(g)(1)(D) and (4).

49. As a result of the conduct of the Defendant, as described in this Count, the Plaintiff, Stuart M. Seldowitz, suffered actual damages.

COUNT THREE

50. The Plaintiff realleges and incorporates by reference the allegations contained in paragraphs one through nine, paragraphs eleven through forty-three, and paragraoh forty-seven of this Complaint, and further charges:

51. At all times pertinent to this Complaint, the Privacy Act, pursuant to 5 U.S.C. § 552a(d)(2), required each federal agency maintaining a system of records to permit an

individual to request an amendment of a record pertaining to him; and required such agency, promptly thereafter, to either:

(a) make any correction of any portion of such record which the individual believes is not accurate, relevant, timely, or complete; or

(b) inform the individual of its refusal to amend such record in accordance with his request.

52. By letter dated March 25, 1998, Mr. Seldowitz requested, pursuant to the above described provision of the Privacy Act, that the OIG:

(a) amend the OIG voucher record to accurately reflect the annotated rental receipts and the complete travel voucher request submitted by Mr. Seldowitz to the P/M Btreau of the State Department on or about May 29, 1990; and

(b) amend the Inspector General's Report and any other files, records or conclusions regarding this matter within the OIG to demonstrate that Mr. Seldowitz submitted accurate and annotated receipts, and a complete and accurate travel voucher request, as described above.

53. By letter dated April 7, 1998, the Deputy Counsel of the OIG informed Mr. Seldowitz that the OIG would neither amend the OIG voucher and other OIG records as requested, nor make a decision refusing to amend such records, such letter stating:

> We understand that the Federal Bureau of Investigation (FBI) is currently conducting a review of the issues raised by Mr. Seldowitz, on behalf of the PCIE [President's Council on Integrity arid Efficiency]. Accordingly, it would be inappropriate to respond or to

comment upon those issues until the conclusion of that review.

54. By letter dated May 13, 1998, Mr. Seldowitz repeated the aforesaid request to the Office of IRM Programs and Services of the State Department ("the IRM Office"). By letter dated June 1, 1998, the IRM Office notified Mr. Seldowitz that it saw "no prospect of action being taken by the OIG" on Mr. Seldowitz request to amend the OIG voucher and other OIG records until completion of the above described PCIE review.

55. Stuart M. Seldowitz has exhausted his administrative remedies pursuant to 5 U.S.C. §

552a(d)(3); attached to this Complaint is a letter issued on June 22, 1998, by the Appeals Officer of the IRM Office.

The Charge

56. Beginning on April 7, 1998, and continuing until the date of this Amended Complaint, the Office of the Inspector General of the U.S. Department of State, and the U.S. Department of State, have:

(a) refused to amend the OIG voucher record to accurately reflect the annotated rental receipts and the complete travel voucher request submitted by Mr. Seldowitz to the P/M Bureau of the State Department on or about May 29, 1990;

(b) refused to amend the Inspector General's Report and any other flies, records or conclusions regarding this matter within the OIG to demonstrate that Mr. Seldowitz submitted accurate and annotated receipts, and a complete

and accurate travel voucher request, as described above; and

(c) failed to make a review of such refusals in conformity with 5 U.S.C. § 552a(d)(3); all in violation of 5 U.S.C. § 552a(g)(1)(A).

Request for Relief

The Plaintiff, Mr. Seldowitz, hereby demands and seeks that judgment be entered in favor of himself, and against the United States, as follows:

1. For fifteen thousand dollars ($15,000) incurred by the Plaintiff, as a direct result of the Plaintiff being unlawfully coerced into executing the above described settlement agreement and making payment on that agreement;

2. For five thousand dollars ($5,000) incurred by the Plaintiff, as a direct result of the Plaintiff being required to hire, and pay for, legal representation for the negotiation of the aforesaid settlement agreement;

3. For interest on the above damages, from the date on which the damages were incurred;

4. Additional actual damages, as compensation for damage to the Plaintiffs reputation, career, and career opportunities, and for mental anguish and humiliation, in the amount of one million dollars ($1,000,000);

5. For an order compelling the Inspector General of the U.S. Department of State, and the U.S. Department of State, to amend:

(a) the OIG voucher record to accurately reflect the annotated rental receipts and the complete travel voucher request submitted by Mr. Seldowitz to the P/M Bureau of the

State Department on or about May 29, 1990; and

(b) the Inspector General's Report and any other files, records or conclusions regarding this matter within the OIG to demonstrate that Mr. Seldowitz submitted accurate and annotated receipts, and a complete and accurate travel voucher request, as described above;

6. For all reasonable costs and expenses incurred by Mr. Seldowitz in relation to this civil action, plus all reasonable attorney's fees and costs; and

7. For such other and further relief as the Court deems just and equitable.

Demand for Jury Trial

Plaintiff hereby demands that this matter be tried before a jury.

Respectfully submitted,

ANDREW GROSSO
D.C. Bar Number 358326
2300 N Street, N.W, Suite 600
Washington, D.C. 20037
Telephone: (202) 663-9041
Facsimile: (202) 663-9042
Attorney for Stuart M. Seldowitz

United States Department of State
Washington, D. C. 20520

JUNE 22 1998

Mr. Andrew Grosso
2300 N Street, N.W. Suite 600
Washington, D.C. 20037

Dear Mr. Grosso:

I am writing in response to your letter of June 5, 199:3 to the Assistant Secretary for Public Affairs in which you appealed because of a decision made by the Director of the Office of IRM Programs and Services in connection with Privacy Act request 199800301 by your client, Stuart M. Seldowitz.

This Privacy Act request is not subject to administrative appeal at this time. The action taken by the Director of IRM Program and Services was to suspend action on your case pending the completion of an investigation. As the case is still in process, there is no adverse determination ripe for administrative appeal.

However, an individual may seek judicial review of an agency's determination not to amend a record, if the individual contends that the agency has not considered the request to review in a timely manner or otherwise has not acted in a manner cDnsistent with the requirements.

If you have questions regarding the specific issue of appeals, please feel free to write to the Appeals Office, Office of Information Resources Management, Programs, and Services, Room 1512, Department of State, 2201 C Street, Washington D.C. 20520-1512. Please refer to your FOIA case number in any correspondence.

Sincerely,

Charles Lahiguera
Appeals Officer
Office of IRM Programs and Services

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

STUART M. SELDOWITZ,
Plaintiff,

v.

THE OFFICE OF THE
INSPECTOR GENERAL, U. S.
Department of State,
Defendant.

Judge Henry H. Kennedy

October 26, 1998

SECOND AFFIDAVIT OF STUART M. SELDOWITZ

I. My name is Stuart M. Seldowitz, and I am the Plaintiff in the above captioned case. This Affidavit is being submitted in support of Plaintiffs Memorandum of Law and Points in Opposition to United States of America's Motion to Dismiss.

2. Filed previously with this Court and attached to Plaintiffs Motion for Default Judgment is another affidavit which I submitted in support of that motion ("the First Affidavit"). I do hereby adopt and incorporate the First Affidavit, and the documents referenced and attached thereto, as part of this affidavit.

3. In June 1995, 1 hired attorney Ralph Drury Martin of the Washington, D.C., law firm Storch & Brenner to represent me during my settlement negotiations with the U.S. Attorney's Office for the Eastern District ofVirginia. Those negotiations concluded, and a settlement was executed in

July 1995.

3. After the settlement was executed, I asked Mr. Martin to obtain for me copies of the voucher documents, in the possession of the U.S. Attorney's Office, which the U.S. Attorney's Office has received from the OIG.

4. Mr. Martin forwarded those voucher documents to me in April 1996. Attached to this Affidavit as Exhibit A is a copy of the transmittal letter from Mr. Martin which accompanied these documents, dated April 15, 1996. Attached to this Affidavit as Exhibit B is 2: copy of the envelope in which this letter, and the accompanying documents, arrived. It is postmarked April 17, 1996.

5. As I explained in my First Affidavit, I did not have an opportunity to compare the voucher documents I had earlier obtained from the National Finance Center ("NFC") with those provided by the U.S. Attorney's Office to Mr. Martin until after April 17, 1996. It was not until I physically compared these two sets of documents, page by page, that I noticed the discrepancies between them. Among these discrepancies are that: (a) certain pages in the voucher documents obtained from the National Finance Center were marked with the letters "NFC," whereas the equivalent pages in the voucher documents obtained from the U.S. Attorney's Office record did not bear such marking; (b) the front page of the voucher form, as included in the U.S. Attorneys's documents, had been stamped with the word "PROCESS," whereas that page in the NFC's documents did not bear such stamp; and (c) the documents obtained from the U.S. Attorneys Office omitted pages which were included in the documents provided by the NFC. In addition, rental receipts which did not have my written annotations on them were included in the U.S. Attorney's documents as if they were part of the travel voucher I had submitted in May 1990, whereas the actual travel voucher I had submitted, as well as

the copies of those documents I obtained by me from the NFC, had those annotations on them.

6. Based upon these observations, I learned for the first time that the Inspector General's Office ("OIG") had misrepresented to the U.S. Attorney's Office, and subsequently to me, that its copy of my May 1990 travel voucher, and attachments, which it had used to investigate me for allegations of submitting false claims to the Department of State, was the actual travel voucher and attachments (or a true copy thereof) which: (a) I had submitted, and (b) had been received and was then being maintained by the U.S. Department of State.

7. I executed the settlement agreement with the U.S. Attorney's Office for the Eastern District of Virginia, which is dated July 26, 1995, and which is signed by myself, by my wife, Rosalinda M. Seldowitz, and by Assistant U.S. Attorney Richard Sponseller, on July 31, 1995. I executed this agreement on that date because I was informed by the law firm which then represented me, Storch & Brenner, that it had been told by the U.S. Attorney's Office that, if I delayed executing the agreement beyond a specific date (which date was on or shortly after July 31), the U.S. Attorney's Office would commence a civil suit against me and my wife under the False Claims Act.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26 day of October, 1998,
in Washington, D.C.

STUART M. SELDOWITZ

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

STUART M. SELDOWITZ,
Plaintiff,

v.

THE OFFICE OF THE
INSPECTOR GENERAL, U. S.
Department of State,
Defendant.

Judge Henry H. Kennedy

October 26, 1998

AFFIDAVIT OF RALPH DRURY MARTIN

1. My name is Ralph Drury Martin. I am an attorney and a member of the bar of this court. I am also a partner in the law form of Storch & Brermer, L.L.P., located at 10001 Connecticut Avenue, N.W., Washington, D.C. Prior to entering private practice I served as a senior prosecutor for the Public Integrity Section of the U.S. Department of Justice, and as a Special Counsel for the U.S. Department of State.

2. On or about June 15, 1995, I was retained by Mr. Stuart M. Seldowitz to represent him in a matter involving the Office of the Inspector General of the U.S. Department of State ("OIG") and the U.S. Attorney's Office for the Eastern District of Virginia ("the U.S. Attorney's Office"). At that time the OIG was alleging that Mr. Seldowitz and his wife, Rosalinda Seldowitz, had presented false travel voucher requests to the Department of State. Pursuant to my

representation of Mr. Seldowitz, I negotiated a settlement with the U.S. Attorney's Office in the amount of fifteen thousand dollars. ($15,000). The Assistant U.S. Attorney for the Eastern District of Virginia who negotiated this settlement on behalf of the government was Richard W. Sponseller.

3. After the settlement was executed, Mr. Seldowitz asked me to obtain on his behalf a copy of the May 29, 1990, travel voucher (with attachments), submitted by Mr. Seldowicz to the Executive Office of the Bureau of Political/Military Affairs of the State Department, as thai copy appeared in the files of AUSA Sponseller.

4. By letter dated September 25, 1995, AUSA Sponseller provided those voucher documents to me. Attached to this Affidavit as Exhibit A is a copy (from my files) of the transmittal letter from AUSA Sponseller, and the voucher documents which accompanied that letter.

5. I did not forward these voucher documents, supplied by AUSA Sponseller, to Mr. Seldowitz until April 15, 1996. Attached to this Affidavit as Exhibit B is a copy (from my files) of the transmittal letter, dated April 15, 1996, which I sent to Mr. Seldowitz with those voucher documents.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

]

Executed this 26 of October, 1998,
in Washington, D.C.

RALPH DRURY MARTIN

(2)

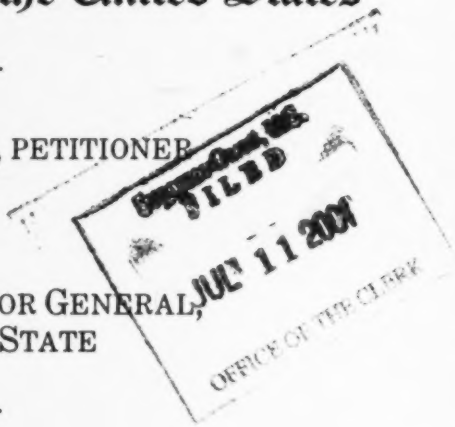
No. 00-1558

# In the Supreme Court of the United States

STUART M. SELDOWITZ, PETITIONER

*v.*

OFFICE OF THE INSPECTOR GENERAL,
DEPARTMENT OF STATE




*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
STUART E. SCHIFFER
*Acting Assistant Attorney General*
LEONARD SCHAITMAN
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19pp

## QUESTIONS PRESENTED

1. Whether the Department of State properly promulgated regulations implementing the Privacy Act of 1974, and whether the Department properly followed its regulations relating to petitioner's Privacy Act amendment requests.

2. Whether petitioner's claims for damages are barred by the Privacy Act's statute of limitations.

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# In the Supreme Court of the United States

No. 00-1558

STUART M. SELDOWITZ, PETITIONER

*v.*

OFFICE OF THE INSPECTOR GENERAL,
DEPARTMENT OF STATE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but the decision is noted at 238 F.3d 414 (Table). The orders of the district court (Pet. App. 12a-17a, 18a-25a) are unreported.

### JURISDICTION

The judgment of the court of appeals was filed on November 13, 2000. A petition for rehearing was denied on January 9, 2001 (Pet. App. 26a). The petition for a writ of certiorari was filed on April 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Privacy Act of 1974 (the Act or Privacy Act), 5 U.S.C. 552a *et seq.*, governs the maintenance of records on individuals by federal agencies. The Act establishes fair information practices for the federal government. It restricts disclosure of personal information and gives individuals certain rights of access to and amendment of records pertaining to them. An agency may be held civilly liable, and liable for attorney's fees, for intentionally or willfully failing to fulfill the substantive requirements of the Act. 5 U.S.C. 552a(g). The Act provides a two-year statute of limitations. 5 U.S.C. 552a(g)(5).

Subsection (d) of the Act provides that on request, an individual shall have access to records that pertain to him within a system of records. 5 U.S.C. 552a(d)(1). An individual may request amendment of such records when he believes that they are not "accurate, relevant, timely, or complete." 5 U.S.C. 552a(d)(2)(B)(i). Such a request obligates the agency to amend the records or inform the individual of its reasons for refusing to amend. 5 U.S.C. 552a(d)(2). The individual has a right to an administrative appeal and, if such an appeal is denied, to review in the district court. 5 U.S.C. 552a(d)(3) and (g)(1).

The Privacy Act grants agencies the power to exempt investigatory systems of records from certain requirements of the Act, including the amendment provision. Under Subsection (j)(2), the head of an agency may by regulation exempt any system of records from any part of the Act, with exceptions not relevant here, if the system of records is "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the

enforcement of criminal laws * * * and which consists of * * * information compiled for the purpose of a criminal investigation." 5 U.S.C. 552a(j)(2). The agency must state the reasons for the exemption. 5 U.S.C. 552a(j). Similarly, Subsection (k)(2) permits the promulgation of rules exempting "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)." 5 U.S.C. 552a(k)(2).

The Department of State has promulgated regulations, pursuant to 5 U.S.C. 552a(j)(2) and (k)(2), that exempt the systems of records maintained by the Department's Office of the Inspector General (OIG) from, among other provisions, the amendment provisions of Subsection (d)(2) of the Privacy Act. See 22 C.F.R. 171.32. Section 171.32(i) provides that OIG records are "exempted under 5 U.S.C. 552a(j) to the extent authorized and determined by the agency originating the records." According to the Department of State, these records are exempted under Subsection (j) "to the extent necessary to protect properly classified information and to assure the effective completion of the investigative and judicial processes." 56 Fed. Reg. 7071, 7073 (1991); 22 C.F.R. 171.32(h). The regulations further provide that OIG law enforcement records not covered by Subsection (j) of the Act may be exempt under Section 552a(k)(2). 22 C.F.R. 171.32(j)(2). The reasons for this exemption include preventing individuals who are the subject of investigation from frustrating the investigatory process, ensuring the integrity of law enforcement activities, and preventing disclosure of investigatory techniques. *Ibid.*

2. In 1989, petitioner began working at the Office of Strategic Nuclear Policy, within the Bureau of

Political/Military Affairs of the State Department. Pet. App. 64a. In 1990, petitioner served on the United States delegation to the Nuclear and Space Talks (NST) in Geneva, Switzerland. *Ibid.* Petitioner's wife served as secretary to the Deputy Negotiator on the NST's Defense and Space negotiating group. *Ibid.* Petitioner and his wife rented a private apartment together from February 9 through May 26, 1990. *Id.* at 65a. Both petitioner and his wife received full per diem compensation for their living expenses in Geneva. *Id.* at 64a. Their landlord provided separate receipts for the full amount of the rent to both petitioner and his wife. *Id.* at 65a.

Petitioner submitted a travel voucher for reimbursement with his rental receipt attached. Pet. App. 66a. He annotated the receipt, crossing out the full amount of rent and writing in half of the amount. *Ibid.* Petitioner alleges that he was thereafter instructed by telephone not to annotate his receipts, and did not make any further notations on subsequent vouchers. *Ibid.* Petitioner does not dispute that the full amount of rent appeared on the travel voucher that he signed. *Id.* at 2a.

3. In 1991, OIG investigated travel vouchers submitted by certain members of the United States delegation to the NST, including those of petitioner. Pet. App. 67a. Petitioner and his wife were informed that they were under investigation for submitting false claims against the United States by submitting vouchers for the full amount of their monthly rent while in Geneva. *Ibid.* Petitioner informed OIG during that investigation that he had annotated the first receipt to reflect half of the rent amount and that he had been instructed not to annotate any further receipts. *Ibid.*

In May 1995, the United States Attorney's Office for the Eastern District of Virginia informed petitioner that it was considering bringing a civil action against him under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* Pet. App. 67a-68a. On June 15, 1995, petitioner met with officials from the Department of State, OIG and an Assistant United States Attorney. *Id.* at 68a-69a. At that meeting, petitioner was shown unannotated receipts from his first voucher. *Id.* at 69a. After retaining counsel, petitioner entered into a settlement of his false claims charges in the amount of $15,000. *Id.* at 69a-70a.

Petitioner subsequently requested from the National Finance Center a copy of his first travel voucher. Pet. App. 70a. On October 5, 1995, he received the voucher, with annotated receipts attached to it. *Ibid.* Upon receiving the voucher, petitioner "became [] aware that the U.S. Attorney's Office had possession of incorrect records." *Ibid.* In September 1995, the United States Attorney's Office conveyed to petitioner's attorney copies of the first voucher submission used in the false claims investigation. *Id.* at 15a. Petitioner did not receive these documents from his attorney until April 17, 1996. *Id.* at 71a.

On March 25, 1998, petitioner, through his attorney, requested that OIG amend its records. Pet. App. 75a. OIG requested an external investigation of the apparent discrepancy in its records. Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss 16-17. The government conducted an investigation to review the OIG investigation of petitioner. Pet. App. 75a. In response to a letter by petitioner, OIG explained by letter that it could not amend its records pending the completion of that investigation. *Id.* at 75a-76a. Prior to the commencement of petitioner's district court

action, no final administrative action by the agency took place on his request that his records be amended.

4. Petitioner filed a complaint in the United States District Court for the District of Columbia, seeking amendment of OIG files and records and damages to compensate for legal fees, the FCA settlement, and reputational and emotional harm. Pet. App. 60a-78a. Petitioner's theory of the case was that OIG deliberately used an incorrect copy of the voucher, and thereby induced the FCA suit. *Id.* at 60a-61a.

Count I charged that OIG violated 5 U.S.C. 552a(g)(1)(C) and (4) by failing to maintain the voucher records with such accuracy, relevance, and completeness as necessary to assure fairness in the determination whether to pursue the FCA suit against petitioner. Pet. App. 63a-73a. Count II claimed damages under 5 U.S.C. 552a(g)(1)(D) and (4) for OIG's intentional misuse of the voucher records to induce a settlement of the FCA suit. Pet. App. 73a-74a. Count III alleged that OIG violated 5 U.S.C. 552a(g)(1)(A) by refusing to amend its records pertaining to petitioner's travel vouchers, refusing to state why it denied such amendment, and failing to make a proper review of its denial. Pet. App. 74a-77a. Petitioner challenged OIG's decisions regarding three specific sets of records: records connected to OIG's FCA investigation of petitioner (FCA investigation records), the original audit records of the Geneva delegation (audit records), and records generated by an internal review of OIG's handling of the Geneva audit and ensuing FCA investigations (internal review records). The complaint requested over one million dollars in damages and amendment of records pertaining to petitioner's travel voucher. *Id.* at 77a-78a.

After the case was transferred to the Eastern District of Virginia, the district court held that Counts I and II were barred by the two-year statute of limitations under the Privacy Act. Pet. App. 13a-16a. The court determined that even on the face of the pleadings, petitioner had knowledge of the alleged misrepresentations regarding the annotations on his travel vouchers at least as early as October 1995 and that his April 1998 complaint was therefore filed too late. *Id.* at 15a-16a.

The district court subsequently granted summary judgment against petitioner on the remaining count of his complaint, which sought amendment of his files. The district court determined that the documents at issue were in part exempt from the requirements of the Privacy Act under 5 U.S.C. 552a(j)(2) and (k)(2) and the Department of State's implementing regulations, 22 C.F.R. 171.32(h), (i) and (j), and in part beyond the scope of the Privacy Act because they were not indexed or retrievable by the name of an individual. Pet. App. 18a-25a.

The court of appeals affirmed the dismissal of Counts I and II of the complaint on statute of limitations grounds, finding that petitioner was "aware of the alleged inaccuracies when the AUSA showed him the unannotated receipts on June 15, 1995. At that point, * * * the statute of limitations began to run." Pet. App. 6a. The court of appeals also affirmed summary judgment as to the investigatory and audit records created by the Department of State. *Id.* at 10a. Regarding the FCA investigation records, the court determined that "OIG records fall squarely within the general exemption which permits exclusion of records 'pertaining to the enforcement of criminal laws,'" and that Department of State regulations had properly

exempted the investigatory records. *Id.* at 7a (quoting 5 U.S.C. 552a(j)(2)). Regarding the audit records, the court concluded that even if the general exemption for criminal enforcement records did not apply, the specific exemption for "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)," 5 U.S.C. 552a(k)(2), did apply, and that the Department's regulations had properly exempted these records as well. Pet. App. 8a. Regarding the internal review records, the court remanded for further discovery as to whether those documents constituted records retrievable by name and were therefore potentially within the ambit of the Privacy Act. *Id.* at 9a-10a.

**ARGUMENT**

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 3-15) that the lower courts erred in determining that the FCA investigation records and audit records were exempt from the Privacy Act amendment requirement. This contention lacks merit.

Petitioner relies on 22 C.F.R. 171.32(h) to argue that only files from ongoing investigations are exempt from the amendment requirements of the Privacy Act.[1] That

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[1] 22 C.F.R. 171.32(h) provides:

> Records originated by another agency when that agency has determined that the record is exempt under 5 U.S.C. [5]52a(j). Also, pursuant to Section (j)(2) of the Act, records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Fraud Branch of the Office of Security and by the [I]nspector General may be exempted from the requirements of any part of the Act except subsections (b),

argument fails for two reasons: Subsection (h) does not independently control the exemption issue in this case and, even if it is viewed as the sole, relevant provision, it does not limit the law enforcement exemption to ongoing investigations.

As the court of appeals determined, the relevant portion of the regulation is Subsection (i), not Subsection (h). Subsection (i) states that "[p]ortions of the following systems of records are exempted under 5 U.S.C. 552a(j) to the extent authorized and determined by the agency originating the records," followed by a list that includes "Records of the Inspector General." 22 C.F.R. 171.32(i). Nothing in that subsection limits application of the exemption to ongoing investigatory or criminal processes.

In any event, even if (contrary to fact) Subsection (h) is viewed as the relevant provision, its clause explaining its purpose—ensuring the effective completion of investigations—does not limit its reach to pending investigations. Subsections (a)-(h) merely restate the types of materials that may be exempted under 5 U.S.C. 552a(j) and (k).[2] Subsection (h) deals with 5 U.S.C. 552a(j)(2), specifically mentions OIG, and provides the reason for such exemption: in order "to assure the effective completion of the investigative and judicial processes."[3] 22 C.F.R. 171.32(h).

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(c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent necessary to assure the effective completion of the investigative and judicial processes.

[2] Indeed, immediately preceding Subsections (a)-(h), the regulation states that "[t]he following exemptions are authorized under 5 U.S.C. 552a(j) and (k)." 22 C.F.R. 171.32.

[3] Petitioner is therefore wrong in arguing (Pet. 14-15) that the regulation fails to state the reason for the exemption. Subsection

However, that statement of purpose does not limit the reach of the regulation. The reasons stated for an implementing regulation need not anticipate every possible factual scenario. See *Wentz* v. *Department of Justice*, 772 F.2d 335, 337-339 (7th Cir. 1985) (Subsection (j)(2) "does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case.") (citation omitted), cert. denied, 475 U.S. 1086 (1986). The Privacy Act's broad exemption for criminal investigatory files permits the exemption of entire categories of records according to general rationales, provided they satisfy the requirements of the Act; an amendment request for a covered record may be denied without original, individual evaluation of the justifications behind such action. See *Aquino* v. *Stone*, 957 F.2d 139, 142 (4th Cir. 1992) ("While we can understand that [plaintiff] would want a more individualized evaluation of his file to justify the * * * claim of exemption, * * * we do not think that the Privacy Act was intended to provide an amendatory procedure for records about investigations into violations of the criminal laws."). Therefore, the applicability of the exemptions contained in 5 U.S.C. 552a(j) and (k), as implemented through 22 C.F.R. 171.32, does not hinge on whether the investigation has been completed in this case.

Petitioner contends (Pet. 10-13) that an Office of Management and Budget (OMB) circular interpreting the Privacy Act's law enforcement exemptions requires reversal of the lower court's opinion. Petitioner did not raise that argument until his petition for panel rehearing filed in the court of appeals. Compare Appellant's

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(h) provides the relevant reason, as the district court correctly held. Pet. App. 20a.

C.A. Br. and Appellant's C.A. Reply Br. with Appellant's C.A. Pet. for Panel Reh'g 9-11. Therefore, petitioner has waived further consideration of this argument. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

Regardless of whether petitioner's argument on this point is adequately preserved, the OMB circular in no way undermines the Department of State's promulgation of the regulations relevant here or its determination to delay acting upon petitioner's amendment claim. The circular simply states that agency heads may exempt systems of records under the Act's law enforcement exceptions upon a determination that those records fit within the exceptions; the exemption application is to be published as a rule and provide reasons therefor. See 40 Fed. Reg. 28,948 (1975). The Department of State's regulations published at 22 C.F.R. 171.32 implement the circular's directive: they represent the agency's determination, with accompanying reasons, that OIG investigatory files should be exempt under the Act. No further action by the agency head is required before the regulations may be applied to individual access and amendment requests.

2. Petitioner contests (Pet. 16-21) the lower courts' determination that Counts I and II of his complaint are barred by the statute of limitations. This factbound claim lacks merit and does not warrant further review.

The statute of limitations for actions for damages under the Privacy Act is two years. 5 U.S.C. 552a(g)(5). The statute contains a tolling provision, however, for cases of material and willful government misrepresentation:

> [W]here an agency has materially and willfully misrepresented any information required under this

> section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

5 U.S.C. 552a(g)(5). The question is when petitioner can be deemed to have discovered the alleged misrepresentation regarding the annotations on his reimbursement vouchers.[4]

Petitioner asserts (Pet. 17) that there is a split among the circuits regarding whether, in cases of alleged misrepresentation by the government, the statute of limitations for Privacy Act claims begins to run when a plaintiff has actual knowledge of the misrepresentation or, instead, when he merely has reason to know. Even if such a disagreement exists, it is not implicated by this case. Because both lower courts applied an "actual knowledge" standard in reviewing petitioner's claim—the standard more favorable to petitioner—any circuit split on this issue is not implicated. See Pet. App. 6a ("[Petitioner] had actual knowledge of the alleged error [in June 1995], and the fact that he did not make a physical comparison of the two sets of receipts until April 17, 1996, makes no difference."); Pet. App. 15a-16a ("Even based on the face of the pleadings, Plaintiff had knowledge of the alleged inaccuracies contained in the records at least as of October 1995.").

Petitioner had actual knowledge of the alleged misrepresentation no later than October 1995, and

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[4] OIG does not concede that the alleged misrepresentation was either material to the FCA investigation or willful on the part of the investigators. Petitioner pled no facts indicating willfulness of the alleged misrepresentation in his complaint.

therefore his complaint, filed in April 1998, ran afoul of the two-year statute of limitations.[5] According to petitioner's complaint, upon receiving his original voucher from the National Finance Center on October 5, 1995, he "became [] aware that the U.S. Attorney's Office had possession of incorrect records, these being the aforesaid unannotated rental receipts." Pet. App. 70a. Petitioner's complaint alleges he was unaware that OIG had willfully maintained an inaccurate record until he physically compared the voucher and attachments used in the FCA investigation with that from the National Finance Center. *Id.* at 71a-72a. However, the statute of limitations runs from the discovery of the discrepancy itself, not from the discovery that such discrepancy was deliberate. Section 552a(g)(5) provides for tolling where the agency has "materially and willfully misrepresented any information required under this section to be disclosed to an individual," but extends the statute of limitations no longer than "two years after discovery by the individual of the misrepresentation." 5 U.S.C. 552a(g)(5). By the terms of the statute, therefore, the running of the limitation period does not depend on the discovery of willfulness.[6]

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[5] Indeed, petitioner demonstrated knowledge of the allegedly inaccurate records prior to October 1995. He told OIG investigators of their mistake regarding the annotation of his rental receipts during the course of the investigation prior to the June 1995 meeting to discuss the FCA charge. Pet. App. 67a. Petitioner was shown unannotated receipts at that meeting, *id.* at 69a, and therefore had actual knowledge as of that point that the government had relied on incorrect copies of his vouchers in investigating his reimbursement requests.

[6] Even if the fact of willfulness rather than discovery of the underlying error were relevant to the statute of limitations analysis, petitioner has not explained how the side-by-side com-

Nor is there any merit to petitioner's claim that the courts erred in holding that he had knowledge of the alleged misrepresentation before he could physically compare the two copies—one annotated, one not—of his original vouchers in April 1996. Actual knowledge of government misrepresentation under the Privacy Act does not require physical possession of the relevant records. See *Bowyer* v. *United States Dep't of Air Force*, 875 F.2d 632, 636 (7th Cir. 1989), cert. denied, 493 U.S. 1046 (1990); *Nwangoro* v. *Department of the Army*, 952 F. Supp. 394, 397 (N.D. Tex. 1996) ("[T]he limitations period commences not when the plaintiff first obtains possession of the particular records at issue, but rather when he first knew of their existence.").[7]

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parison of the two copies of the voucher established willfulness on the government's part that was not evident to him before. Such a conclusory assertion need not control, even in the context of evaluating a motion to dismiss. See, *e.g.*, *Fernandez-Montes* v. *Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."); *Morse* v. *Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (same).

[7] Furthermore, petitioner's attorney gained possession of these documents in September 1995. Pet. App. 15a. It is well-established that a document transferred to an attorney is deemed to be in the possession of the client. See, *e.g.*, Fed. R. Civ. P. 5(b) ("Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney * * * ."); *United States* v. *Knohl*, 379 F.2d 427, 441-442 (2d Cir.) (criminal defendant not prejudiced by government's failure to disclose tape recordings before trial where recordings in possession of defendant's attorney), cert. denied, 389 U.S. 973 (1967). If service and other communications are effective upon receipt by a party's attorney, the statute of limitations should not be tolled in this case during the time between receipt and forwarding by petitioner's counsel.

3. Finally, petitioner's claims do not warrant further review for an additional reason: the interlocutory posture of the case. Because the court of appeals remanded for further discovery petitioner's claim regarding the internal review records, there will be further proceedings before the district court. This Court ordinarily does not grant a petition that seeks interlocutory review. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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